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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 WILLIAM MCCAFFREY,

4 Plaintiff,

5 v.

11 CV 1636 (RJS)

6 DAVID DIAZ and ROBERT ARBUISO,

7 Defendants.

8 -----x  
9 New York, N.Y.  
April 28, 2014  
2:40p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN

12 District Judge  
13 and a Jury

14 APPEARANCES

15 IRVING COHEN  
GLENN A. GARBER  
Attorneys for Plaintiff

16 NEW YORK CITY LAW DEPARTMENT  
17 OFFICE OF CORPORATION COUNSEL  
ANDREW GABRIEL LARKIN III  
18 VICKI BECKER ZGODNY  
Assistant Corporation Counsel for Defendants  
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1 THE COURT: All rise for the jury, please.

2 (In open court)

3 (Jury present)

4 THE COURT: Generally, what you do is remain standing  
5 until everybody is in the box, and I'll tell you to have a  
6 seat. But now you're down, that's fine. As a general matter,  
7 you'll get used to it and be comfortable.

8 Okay, have a seat.

9 Everyone else have a seat, as well. Thank you.

10 So ladies and gentlemen, some of you are wearing  
11 coats. It does get chilly in here. It's hard to regulate the  
12 temperature in a room this big or cavernous. Best to bring a  
13 light sweater or jacket or something. You can bring water into  
14 the courtroom. Nobody else can eat or drink in the courtroom.  
15 You can bring in water from the jury room. So I want to make  
16 sure you're hydrated. No coffee or anything else. Spills  
17 happen and that's how a courtroom gets kind of trashed. And we  
18 want to keep this nice for another hundred years.

19 You have your notebooks, that's great. I'll give you  
20 instructions in a moment. But, first, I'm going to have you  
21 stand and take another oath. You took an oath this morning  
22 that you would truthfully answer my questions. Now you'll take  
23 an oath that you will faithfully execute your duty as jurors.

24 Raise your right hands.

25 (Jury sworn)

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1 THE COURT: All right. Please have a seat.

2 All right. So, members of the jury, now that you have  
3 been sworn, I'm going to give you some preliminary instructions  
4 to guide you as we participate -- as you participate in the  
5 trial.

6 I will give you much fuller instructions at the end of  
7 the trial. This is just to help you get started.

8 To begin with, as I told you before, as you already  
9 know, I think you are here to administer justice in this case,  
10 according to the law and the evidence. You are to perform this  
11 task with complete fairness and impartiality, and without bias,  
12 prejudice or sympathy, for or against any party.

13 It will be your duty to find, from the facts -- excuse  
14 me, to find from the evidence, what the facts are. You, and  
15 you alone, are the judges of the facts.

16 And that's not an exaggeration. You are judges, you  
17 are judges of the facts. I'm the judge of the law. And so you  
18 will have to apply to those facts the law as I describe it to  
19 you.

20 You must follow the law that I -- that I explained to  
21 you, whether you agree with it or not, whether you think it is  
22 good or bad, or should be different, you have to follow my  
23 instructions on the law. I'm the judge of on the law, you are  
24 the judge on the facts.

25 Now, nothing that I say or do during the course of

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1 this trial is intended to influence you in any way, so don't  
2 read into it. Don't assume that I'm signaling to you. I'm  
3 not. I have too much respect for what you do as the judges of  
4 the facts.

5 Now, the evidence from which you will find the facts  
6 will consist of the testimony of the witnesses, the documents  
7 that are received into evidence, as well as any other facts  
8 that the parties agree to that are sometimes referred to as  
9 stipulations.

10 Certain things are not evidence, and I want to go over  
11 a few of those things with you right now. First of all, the  
12 statements, arguments, and questions of the lawyers are not  
13 evidence. Nor are my statements to you evidence. Only the  
14 answers given by the witnesses on the stand are evidence, as  
15 well as the exhibits and the stipulations. Objections to  
16 questions are not evidence.

17 The parties and lawyers have an obligation to make an  
18 objection if they believe that evidence being offered is  
19 improper or shouldn't be received. You should not be  
20 influenced by my ruling on an objection. You have all seen TV,  
21 right. If the objection is sustained, then that means the  
22 question is impermissible and there should be no answer to it.  
23 If the objection is overruled, then that means the witness can  
24 answer the question, and you should consider the answers like  
25 you would any other answers. It is not entitled to any greater

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1 or lesser consideration because there happened to be an  
2 objection that I overruled. So the fact that there was an  
3 objection doesn't give it any extra weight.

4 Now, testimony -- well, I guess I should say this. If  
5 you are instructed that some part of the evidence, an answer,  
6 or some other evidence in the case is being received for a  
7 limited purpose only, then you have to follow my instructions  
8 on that, and only consider it for that limited purpose. I'll  
9 explain that more as we go. But use your common sense.

10 Now, testimony that I tell you to exclude or tell you  
11 to disregard as evidence, that's not evidence. You can't  
12 consider it as evidence, so put it out of your mind. You can't  
13 make your brain race like it's a computer, but I will ask you  
14 to just put it to the side and not consider it as evidence.  
15 Don't treat it the way you would treat other evidence in the  
16 case. And I think that you are all capable of following that  
17 instruction, so I'm not worried about that.

18 Finally, anything you may have seen or heard outside  
19 of the courtroom is not evidence and must be disregarded. You  
20 are to decide case solely on the evidence presented in this  
21 courtroom.

22 Now, when you are determining the facts, keep in mind  
23 that there are two kinds of evidence. And I think you know  
24 this, too; direct and circumstantial evidence.

25 Direct evidence is proof of a fact based on what the

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1 witness has observed or experienced based on his or her own  
2 five senses. That's direct evidence.

3 Circumstantial evidence is proof of facts from which  
4 you infer or conclude that other facts exist. The word infer  
5 or the expression to draw an inference simply means that a fact  
6 exists from proof of another fact. So an inference is to be  
7 drawn only if it is a logical and reasonable thing to do. And  
8 it's not supposed to be based on speculation or guesswork.

9 In deciding whether to draw an inference, you must  
10 look at, and consider, all of the facts in light of reason,  
11 common sense, and experience. Whether a given inference is or  
12 is not to be drawn is entirely for you, the jury, to decide.  
13 Circumstantial evidence does not necessarily prove less than  
14 direct evidence, nor does it prove more.

15 Now I'll give you a brief example of circumstantial  
16 evidence that has been used probably longer than this courtroom  
17 has been around, which is 80 years or so.

18 Assume when you came in here this morning that it was  
19 a beautiful day outside, which was the truth. Assume, also,  
20 that we had curtains and blinds so you couldn't look outside  
21 the window. The windows were completely closed up, you  
22 couldn't see what it was like outside.

23 Assume that as you were sitting here, somebody walked  
24 in with an umbrella that was dripping wet. And then a couple  
25 of minutes later, somebody else walked in with a raincoat that

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1 was dripping wet. Now, you couldn't see outside of the windows  
2 in the hypothetical I'm giving you, because of the curtains, so  
3 you wouldn't have any direct evidence of it raining outside.

4 But based on the other facts that I have asked you to  
5 consider and assume, the dripping wet raincoat, the dripping  
6 wet umbrella, it would be reasonable for you to conclude, for  
7 you to infer that it was raining outside. That's all there is  
8 to circumstantial evidence. You conclude, from certain facts,  
9 the existence of other facts. Again, you do that on the basis  
10 of common sense and reason, not on speculation or guesswork.  
11 I'll give you further instructions on this at the end of the  
12 trial.

13 Now, one of your most important tasks as jurors is to  
14 assess and evaluate the credibility of the witnesses who will  
15 testify here in court. Listen carefully to each witness as  
16 they testify, both during the direct examination and the  
17 cross-examination, and consider whether the witness is telling  
18 the truth. It will be up to you to decide how much of the  
19 witness' testimony to believe, which witness to believe or not  
20 believe, and how much of any witness' testimony to accept or  
21 reject.

22 Now, how do you decide what testimony to believe, what  
23 witnesses to credit? Well, you should listen to the witness  
24 testimony, of course. Observe their testimony and their  
25 demeanor. And then decide, as you would decide such questions

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1 in your own life. Did they know what they were talking about.  
2 Were they candid, honest, open. Did they appear to be  
3 truthful. Did they have a reason to falsify, exaggerate, or  
4 distort their testimony. Sometimes it's not what a witness  
5 says, it's how he or she says it that really strikes a chord  
6 with you. That may give you a clue to whether or not the  
7 witness' version of an incident is accurate or truthful. In  
8 short, the way a witness testifies may play an important part  
9 in your reaching a judgment as to whether or not you can accept  
10 the witness' testimony as reliable.

11 Now, as I told you before, this is a civil case. It's  
12 not a criminal case. So the plaintiff, Mr. McCaffrey, has the  
13 burden of proof in this case. He has the burden of proving his  
14 claims by what is called a preponderance of the evidence.

15 Now, those of you who have sat as jurors in criminal  
16 cases, or if you watch TV, you know the standard in a criminal  
17 case is proof beyond a reasonable doubt. That standard does  
18 not apply in a civil case such as this one. You should put  
19 that standard out of your mind, except to the extent that it  
20 may be relevant to your determination as to whether a fair  
21 trial took place. There is a fair trial claim that I will  
22 explain more in detail.

23 What does a preponderance of the evidence mean? To  
24 establish a fact by a preponderance of the evidence means to  
25 prove that the fact is more likely true than not true.

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1 Preponderance of the evidence means the greater weight of the  
2 evidence. It refers to the quality and the persuasiveness of  
3 the evidence, not to the number of witnesses or the number of  
4 documents.

5 This means that a party has to produce evidence that,  
6 considered in light of all of the facts, lead you to believe  
7 that what the party claims is more likely true than not.

8 To put it another way, imagine that you are reviewing  
9 Mr. McCaffrey's claim against the defendants. If you were to  
10 put the evidence that supported the plaintiff's claim on one  
11 side of the scales, and the evidence that supported the  
12 defendant's version on the other side of the scales, the  
13 plaintiffs evidence would have to make the scales tip ever so  
14 slightly in his favor. That's all there is to a preponderance  
15 of the evidence. If the plaintiff fails to do that, he has not  
16 met his burden, and your verdict on the plaintiff's claim must  
17 be for defendants.

18 Now, a few other words about your conduct as jurors.  
19 First, during the trial, you are not to discuss the case with  
20 anyone, nor should you permit anyone to come talk to you about  
21 the case. This includes posting anything on the internet.  
22 Don't do that. Don't Tweet about the case. Don't go on  
23 Facebook, any of the social media sites that we all live our  
24 lives on these days. As a juror, you can't do that. You can't  
25 talk about this case. You have to put that aside, at least for

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1 the duration of this trial. And if you don't, it really can  
2 have serious repercussions for this trial, and for you,  
3 yourselves. And I don't tell you that to scare you, but just  
4 so you understand that it is very important that you not  
5 discuss this case with anyone, that you not sort of go outside  
6 and hit social media sites to discuss what you are doing, what  
7 you have seen, and what you are thinking about this trial,  
8 okay.

9 I also don't want you discussing this case with  
10 anyone, really. You're going to get home tonight, and people  
11 are going to say did you get picked for the jury, tell me about  
12 it, what's it all about. And I want you to resist the  
13 temptation to do that. You can say that, yes, you were picked.  
14 You can say it's a civil trial. But beyond that, I really  
15 don't want you to discuss it. And here's why. I think that if  
16 you start describing the case and explaining it to others,  
17 there is a natural tendency to sometimes start adopting a  
18 version of the story before you have heard all of the evidence,  
19 before you have heard my instructions on the law. And I want  
20 to prevent you from doing that. I want you to remain pure, as  
21 it were. Because until you have heard all of the evidence,  
22 until you have heard my instructions on the law, you are really  
23 not in a position to make conclusions. So I want you to not  
24 discuss this case with anyone. There will be a little bit of  
25 disappointment because people love to know, but it is not a

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1 long trial, and it shouldn't be too much of an inconvenience.  
2 So please take that seriously.

3 Now, don't, while you are serving as a juror, have any  
4 conversations with the parties, the attorneys, or any of the  
5 witnesses. As I said before lunch, if you see any of those  
6 folks in the elevator, in the lobby, in the security line,  
7 don't talk to them, don't acknowledge them. They will do the  
8 same to you. It's just easier and better if we all do it that  
9 way. It keeps the appearance of propriety, as well as  
10 propriety itself. And that's important because sometimes  
11 appearances really matter, especially in a court of law like  
12 this, all right.

13 Third, don't read, listen to, or do any investigation  
14 about the case in any way. If there is any news reports, I  
15 don't know that there will be, but if there are, I don't want  
16 you to read it, or listen to it. I want you to change the  
17 channel or turn the page and immediately tell Mr. Deluzio about  
18 it. Don't discuss it with your fellow jurors: Oh, you won't  
19 believe what I heard.

20 I don't want you to taint anybody else. And it may  
21 not be a problem at all for you, but I want to make sure we are  
22 careful about it, we deal with it before you have talked to  
23 anybody else about it. Tell Mr. Deluzio and he'll tell me and  
24 I'll follow up with you. You can read the paper, watch TV, I'm  
25 not saying you have to be in isolation. If you see anything

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1 else touching on this case, immediately stop at your earliest  
2 convenience, tell Mr. Deluzio.

3 Don't let anybody talk to you about this case. If  
4 anybody approaches you to talk to you about this case,  
5 immediately tell Mr. Deluzio. Tell them you can't speak to  
6 them and tell Mr. Deluzio, all right.

7 If any person you know comes into this courtroom, let  
8 us know that, too. It's a public courtroom, everybody is  
9 welcome to come into the courtroom. But, if there is someone  
10 that you know that comes in, it may be that when the jury is  
11 back in the jury room, that person will hear or see things that  
12 are not intended for the jury. And so I don't want them to  
13 inadvertently say things to you that are not properly before  
14 you. I want you focused only on the evidence in the case and  
15 my instructions on the law. So just let us know if you have a  
16 friend, or you recognize someone in the courtroom. And that  
17 way we'll take steps to make sure that we're careful about what  
18 we say or take precautions to make sure that things are not  
19 shared inappropriately.

20 Don't do any research, don't do any investigations  
21 about this case. Don't go on line, don't go on the internet.  
22 Don't check me out to see, oh, let's find out about this judge.  
23 Don't check the lawyers out. Don't check out any of the  
24 parties. Again, that could compromise the trial. Because I  
25 want you focused exclusively on the evidence, or the lack of

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1 evidence presented in this courtroom. Once you go outside and  
2 start doing investigations of your own, it will compromise that  
3 process and it could also result in serious repercussions for  
4 you. Ever once in a while you read about a case like that,  
5 where a juror or some jurors decide, well, I'm going to do some  
6 internet stuff, I'm going to go Tweet and talk about the case.  
7 And not only does it undermine the trial, but we have to start  
8 all over. But the jurors themselves can then be prosecuted.  
9 And I don't tell you that to scare you, just so you realize and  
10 are mindful of how serious an endeavor this is. So definitely  
11 take it seriously. I know you will.

12 Finally, don't form any opinion until all of the  
13 evidence is in. As I have said now three or four times, until  
14 you have heard all of the evidence, until you have heard the  
15 lawyers in their summations, until you have heard my  
16 instructions on the law, you are really in no position to make  
17 any firm conclusions. So don't go back to the jury room and  
18 talk about what you have seen. I don't want you to do that  
19 until you are deliberating. So even among yourselves, don't  
20 discuss the case until I have instructed you on the law and  
21 it's time for you to begin your deliberations.

22 Now, I see you have notebooks, which is great, that's  
23 fine. You're certainly free to take notes. I ask that you  
24 each put your name on the front of the notebook and that that  
25 be the exclusive place where you keep notes throughout the

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1 trial. At the end of the day, I'll ask you to keep the  
2 notebooks here. We'll secure them so that nobody else will see  
3 them. But I don't want you taking them home on the subway or  
4 bringing them to your apartments or home. So keep all your  
5 notes in those notebooks, and keep your note books here at the  
6 end of the day.

7 Keep in mind -- obviously, take notes as you feel  
8 comfortable taking notes, but at some point when we were all in  
9 school, we all realize you can sometimes take so many notes  
10 that you are missing every other word from the source that you  
11 are supposed be writing the notes about. So be mindful of  
12 that. We have the best court reporters around. We're very  
13 fortunate. We have just really talented court reporters. So  
14 there will be a transcript of this whole proceeding that will  
15 be available to you at the end of the trial. So if you would  
16 like to have some portion of that transcript, we'll make it  
17 available to you.

18 At the end of the trial, I'll also send you a list of  
19 all of the names of the witnesses, and an exhibit list, so if  
20 there is anything you want to see or any testimony you want to  
21 have sent back to you, we can send that to you.

22 Now, if there is a dispute while you are deliberating  
23 between one juror's notes and another juror's notes or one  
24 juror's notes and another juror's memory, the fact that one  
25 juror has notes doesn't give it any greater weight. Again, the

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1 official record, that is binding, and it's your memory that  
2 controls. Notes can be an aid to your memory, but they are not  
3 entitled to any greater weight just because one juror just  
4 happened to have notes, okay.

5 As I said during the course of the trial, there will  
6 be exhibits that are received in evidence. They will have  
7 numbers. And so I'll make them available to you. I'll send  
8 you a list at the end of the case. You can jot down numbers if  
9 you think you are interested, if you would like to see them in  
10 the jury room, you can then quickly tell us what you want. But  
11 I'll send you the list so you don't have to worry about that  
12 too much.

13 All right, let me tell you about how this trial will  
14 proceed. We are about to begin the trial. We'll begin each  
15 day at 9:30 and we'll go to about 5:30, take an hour for lunch,  
16 usually take 10 or 15 minutes in the morning and another 10 or  
17 15 minutes in the afternoon. Please be on time. I promise  
18 that I will be respectful of your time. I know you are all  
19 busy. I know you have other responsibilities and obligations  
20 and that it is in some ways an imposition for you to be  
21 serving. You all recognize it is an important duty and are  
22 taking it seriously. I promise that we will use your time  
23 efficiently. We will do everything we can. That involves  
24 talking about legal issues when you are not around in the  
25 morning before you get here, in the evening when you have left,

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1 at lunch, at breaks. Occasionally, it may be necessary to have  
2 a side bar but only occasionally. And I'll certainly be very  
3 careful that we not waste your time and keep you waiting  
4 around. But, in turn, I really hope that you will all be on  
5 time. Because if we have to wait just for one person, it means  
6 we all wait, because we can't do anything unless we're all  
7 here. Some of you have longer commutes than others and that  
8 makes this a tougher duty than for some, but build in time for  
9 transportation glitches and weather, because those things  
10 happen from time to time.

11 If you are running late because the 4 train is not  
12 running, make sure you have our number, we'll get your numbers.  
13 And we'll give you our numbers so you can call us, if possible,  
14 to let us know you are running late, or if you are sick, or  
15 something, okay. But 9:30 to 5:30, just about every day. That  
16 will be our plan. If we're going to finish early some days  
17 because maybe I have another matter, I'll let you know in  
18 advance, all right.

19 Let me tell you how the case will go. We'll first  
20 start with opening statements. Opening statements are  
21 presented by the lawyers. They are not evidence and they are  
22 not argument. They are just views of what the lawyers believe  
23 the evidence will show. They are important. Listen carefully.  
24 And it will help you understand the evidence as it comes in  
25 during the course of the trial.

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1           After the opening statements, the plaintiff will  
2 present his case. The plaintiff will call his witnesses. And  
3 after each witness testifies on direct examination, then there  
4 will be cross-examination by the defense lawyers. And you have  
5 seen it all on TV, you know how that goes. After the cross,  
6 there might be some brief, what's called redirect examination.  
7 And then maybe some brief recross. But it gets shorter and  
8 shorter each time.

9           After the plaintiff has finished, the plaintiff will  
10 rest. The defense will then, if they wish, put on a case of  
11 their own. They'll call witnesses. They'll be examined on  
12 direct examination. And there will be cross-examination, just  
13 like before.

14           After the evidence is completed and both sides have  
15 rested, the parties will then give their summations. And  
16 that's the final opportunity for the lawyers to summarize the  
17 case and to make their arguments as to what the evidence shows.

18           After that, I will then instruct you on the law much  
19 more fully than I did today.

20           And after that, you will then begin your  
21 deliberations.

22           So we've get a few days of work ahead of us, but I  
23 want to thank you for your attention so far. And I look  
24 forward to serving with you in this matter.

25           Okay, so with that, we'll now begin with the

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1 plaintiff's opening by Mr. Garber.

2 Mr. Garber.

3 MR. GARBER: Thank you.

4 As the judge, said my name is Mr. Garber, Glenn  
5 Garber. And I represent Wil McCaffrey, along with my  
6 co-counsel, Irving Cohen.

7 Good afternoon, ladies and gentlemen.

8 This case is about the conviction of an innocent man  
9 who faced an unfair trial, and was convicted of one of the most  
10 horrific crimes imaginable. Of a rape. A rape in the first  
11 degree, and sentenced to 20 years in maximum security prisons  
12 in New York State, despite his innocence. Four years before  
13 the truth came out and he was finally exonerated and set free.  
14 There is no dispute about his innocence, ladies and gentlemen.

15 Buirny Peguero, the purported rape victim, pled guilty  
16 to perjury and went to jail herself. She came forward to a  
17 priest and admitted that she had lied at the trial of Mr.  
18 McCaffrey.

19 But this case, here, is also about the actions of the  
20 defendants, Detectives Arbuiso and Detective Diaz. And in  
21 their zeal -- this is in the investigation of that criminal  
22 case -- in their zeal to get a conviction at all costs, they  
23 cheated. And the evidence will show that these defendants,  
24 knowing that the cause of the physical injuries on Buirny  
25 Peguero -- Buirny Peguero was the purported rape victim --

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Opening - Garber

1 knowing their significance and knowing how important they were  
2 to the criminal trial of Wil McCaffrey, they influenced --  
3 okay, let me just back up a bit.

4 Those injuries turned out to be very, very important,  
5 because they were corroborative evidence of what Buirny Peguero  
6 was saying about the rape. And what the defendants did, was  
7 they influenced other witnesses. These are the friends of  
8 Buirny Peguero who were critical witnesses at that trial. It  
9 was Aurora Pujols and Maria Sosa. Influenced those witnesses  
10 not to tell the jury, at the criminal trial, about the true  
11 source of those injuries. Because it was portrayed at the  
12 trial that it was Wil McCaffrey who caused those injuries. And  
13 it was corroborative evidence, as it was argued by the  
14 prosecutor at that trial, of the rape and of what Buirny  
15 Peguero was saying. But, in reality, there had been a fight  
16 between Buirny Peguero, the purported rape victim, and her  
17 friends. And they were, in fact, the cause of those injuries.

18 And these defendants influenced them to not tell the  
19 prosecutor, and not tell the jury about that, throwing the  
20 fight and causing this innocent man, Wil McCaffrey, to go to  
21 jail for a crime that he did not commit.

22 Now, the case is also about tragedies and a series of  
23 tragedies. There was the purported rape of Buirny Peguero,  
24 which was a false tragedy. And there was the nightmare that  
25 flowed from that. It was not only the unfair trial, the

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Opening - Garber

1 evidence will show, of Mr. McCaffrey who had to sit through  
2 this case and feel his heart sink as evidence came in that was  
3 not true, it was the terror of facing that despite his  
4 innocence, the run-away train, his protestations of innocence  
5 which he made to the police when they first arrested him, which  
6 he made when he testified before the grand jury, which he made  
7 when he testified at the trial, were ignored. And then the  
8 verdict of guilty that he had to sit through and hear guilty of  
9 rape in the first degree. And other charges. And the harsh  
10 sentence of 20 years in a maximum security prison.

11 This poor man was placed in a facility, or in  
12 facilities, with the worst of the worst, and for the crime of  
13 rape, one of the most disgusting, vile, heinous crimes. And  
14 you will hear that the one thing that people in maximum  
15 security prisons, murderers, other violent criminals, what they  
16 can rally around is we all hate rapists. It's a terrible,  
17 terrible thing. You wouldn't wish it on your worst enemy.

18 And this case is about that, in many ways, and about a  
19 man, a proud man who was actually raised by women. His father  
20 had left, he really didn't have a father. And he had to deal  
21 with the badge, or the scarlet R of rape. Had to deal with his  
22 family about that, and all of the shame and embarrassment. The  
23 most insidious violation of women, he was falsely convicted of.

24 You'll hear about the emotional suffering that he  
25 endured while he was going through the process, sitting through

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Opening - Garber

1 the trial, and then going up to maximum security prisons with  
2 the toughest guards, and the toughest criminals.

3 You will hear that Wil is not a choirboy. Wil has had  
4 his scrapes with the law. Wil grew up in a tough neighborhood  
5 in the South Bronx. But he's a proud, stoic, quiet man. And  
6 he's going to testify at this trial. And he's going to try  
7 very hard to express to you the suffering that he went through,  
8 for a crime that he did not commit. The deprivation of  
9 dignity, the contemplation of suicide, as he languished in  
10 State prison, hoping that evidence would come forward that  
11 would free him.

12 The evidence will show, well, you'll learn about the  
13 criminal justice system. And you'll learn about sort of like a  
14 multilayered trial, in a way. You have a trial in a civil case  
15 that, actually, the subject of it is what happened in a  
16 criminal case, but you'll learn how vulnerable that criminal  
17 justice system is. And how the suppression of evidence that is  
18 favorable to an accused, is an insidious thing. And it can  
19 undermine and deprive somebody's right to a fair trial, as what  
20 happened in this case.

21 You will also learn how easy it is for detectives,  
22 trained police officers with a Special Victims Unit that deal  
23 with rape cases, how easy it is for them to manipulate  
24 evidence, to throw a fight, or to make a trial unfair. And how  
25 they exploited that knowledge to do it.

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Opening - Garber

1           You will learn that the criminal case against Mr.  
2 McCaffrey was not a very strong case. It rested on the word of  
3 Buirny Peguero, only. The rape victim. Or the purported rape  
4 victim. She was intoxicated. There was no semen found to  
5 corroborate that there was a rape. The physical examination  
6 was inconclusive. And what became significant during that  
7 investigation and that trial, were the physical injuries that  
8 she had on her. The photographs that were taken when she was  
9 first evaluated for this purported rape. And the injuries, by  
10 the way, that were caused by her friends and not Wil McCaffrey,  
11 became touted before that criminal jury, and became argued by  
12 the prosecution as strong corroborative evidence. Strong  
13 corroborative evidence of a fight that happened between the  
14 women, and not -- and not injuries caused by Mr. McCaffrey.

15           Now I'm going to digress a little bit, because I want  
16 to get into the background of the trial, so that I can give you  
17 a little bit more context of beyond what I have just given you  
18 and just so you know, the criminal trial is a historical event.  
19 It happened in 2005, 2006. And we're going to recreate it for  
20 you. We're going to try to streamline it a little bit. There  
21 is gonna be transcripts that are going to come in. And they're  
22 going to be available to you to read, because you have to  
23 understand that criminal trial. And what's going to happen is  
24 there will be kind of like a little play, I guess. There is  
25 gonna be excerpts that are going to be read to you, we're going

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Opening - Garber

1 to read to you. And then Mr. Cohen is going to act as a  
2 witness, I'm going to act as a lawyer from that criminal trial  
3 and read transcripts. And we're going to hear Q and A so that  
4 it can be reenacted for your benefit. And during that part of  
5 the plaintiff's case, the defendants and their counsel are also  
6 going to reenact portions of it, as well.

7 But I'm going to give you a little bit of background,  
8 okay. It was a September 18th or 19th of 2005, that evening.  
9 And Buirny Peguero, Aurora Pujols, and Maria Sosa, residents of  
10 New Jersey, came to Manhattan to go clubbing. Two other people  
11 came with them, as well, it Heliana Medina and Orlando  
12 Betonces. They went out to a club called The Umbrella Lounge.  
13 And Ms. Peguero and Aurora Pujols got intoxicated. I think Mr.  
14 Betonces and Ms. Medina did, as well. They drank multiple  
15 drinks called Blue Hawaiians that have vodka in it, mixed  
16 drink. Maria Sosa was the designated driver, and she was not  
17 drinking.

18 After clubbing, they stopped at a restaurant in upper  
19 Manhattan before they were going return to New Jersey in the  
20 car that they had, and they were going to use the bathroom and  
21 they were going to get something to eat.

22 Ms. Peguero and Ms. Pujols are in the vehicle, alone,  
23 while the others were in the restaurant, before they were going  
24 back to New Jersey. And the car was illegally parked at a bus  
25 stop in front of the restaurant.

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Opening - Garber

1           Meantime, Mr. McCaffrey and three of his friends were  
2           cruising around, and hoping to go to an after-hours club. And  
3           they were looking, hoping that some women would accompany them  
4           to the after-hours club. Otherwise, they feared that they were  
5           not going to be able to get in.

6           They see Ms. Peguero and Ms. Pujols in their car. And  
7           Mr. McCaffrey strikes up a conversation with Ms. Peguero. She  
8           is receptive and she's willing to go to this after-hours club  
9           with him. He's a little bold, there is no question about that.  
10          Gets into their car, the women's car, and continues talking to  
11          Ms. Peguero. And she offers to drive the car -- his friends  
12          are in another car nearby -- off to go to the after-hours club.

13          Ms. Pujols, who is drunk, gets out of the car and says  
14          I don't want to go. And the car drives around the corner.  
15          Mind you, there is no discussion with Ms. Peguero or Mr.  
16          McCaffrey about the other friends back at the restaurant, and  
17          they are left in the lurch without a car.

18          Ms. Pujols -- in Ms. Pujols's car, by the way, who  
19          gets out of her own car. And there is no way for these  
20          individuals to get back to New Jersey.

21          So what happens is Wil McCaffrey and Buirny Peguero --  
22          she actually gets in the car to drive, initially, but she is  
23          too drunk. He drives around to a parking lot nearby. They  
24          park her car and go out looking for the after-hours club in a  
25          van that one of his friends had. And they are gone for maybe

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1 45 minutes. There is no after-hours club. It was closed and  
2 they never wound up going. And they wound up dropping  
3 Ms. Peguero back at the parking garage. And in the meantime,  
4 Ms. Peguero's friends are panicking. Calls going back and  
5 forth. It is not clear what exactly is being said. It's  
6 disputed at the criminal trial, what's going on with the phone  
7 calls between Ms. Peguero and her friends. But, eventually,  
8 probably 45 minutes, maybe an hour later, Ms. Peguero was  
9 dropped off at the parking garage. And she's still drunk. And  
10 Mr. McCaffrey says to the garage attendant, or one of them.  
11 Her friends are coming, don't give her the keys to the car,  
12 she's drunk. There is argument -- that came out at the  
13 criminal trial -- between Mr. McCaffrey and the garage  
14 attendant about the keys. And they leave. And Ms. Peguero is  
15 at the parking garage.

16 Now, it's the events that unfold at this point that  
17 become very, very critical. Ms. Peguero's friends join up with  
18 her a few minutes later. And there is a fight, a violent  
19 alteration. It's not clear who starts the fight. It may be  
20 Ms. Peguero. It may be Ms. Pujols. But there is a fight  
21 amongst the women in the car. And it gets so violent that  
22 there is hair pulling, there is scratching, and kicking.

23 Ms. Pujols actually bites Ms. Peguero in the arm.  
24 Ms. Peguero kicks the windshield of the car, and causes about a  
25 10-inch crack in the windshield of the car. And this is all

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Opening - Garber

1 witnessed by two parking garage attendants who are situated  
2 only a few feet away from this.

3 The women go back to New Jersey. And on the way back,  
4 one of the women, it appears as if it is probably Heliana  
5 Medina says to Buirny Peguero -- this is after they settle down  
6 after this major fight -- did they rape you. And Ms. Peguero  
7 says, yes. That's what happened.

8 So the women get concerned and take her to a hospital.  
9 They go to a hospital in New Jersey. It's Christ Hospital in  
10 Jersey City. And she's given an exam. And, very importantly,  
11 photographs are taken of all of those injuries. Those injuries  
12 caused by her girlfriends and, likely, Aurora Pujols. These  
13 photos are passed along to detectives in the case, the  
14 defendants here. They are given to the prosecutor, ultimately,  
15 for the trial. And they become the false evidence that,  
16 corroboration that they portray at trial as the injuries caused  
17 by Mr. McCaffrey.

18 Now, what happens, though, is after the hospital  
19 evaluation, the women are all brought back to the precinct in  
20 New York. It's a New York case. So the detectives in New  
21 York, these detectives, have jurisdiction over it. Even though  
22 the women were in New Jersey at the hospital, the case became  
23 investigated by the police in New York. And, there, the police  
24 first drive the women around, looking to retrace the steps from  
25 the prior evening. They are taken back to a precinct and they

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1 are interviewed.

2 Now, mind you, the detectives get information from the  
3 other detective in New Jersey who was at the hospital, that the  
4 windshield of the car had been broken, that there might have  
5 been a carjacking of the car. And they interview the women at  
6 the precinct about what happened. At that interview, these  
7 detectives are informed, by the women, that there was a fight  
8 in the car amongst them. And what the police say, what these  
9 defendants, these detectives, say is that, look, your friend  
10 was raped. That's not important. That fight you had in the  
11 car can only affect the case. And they influence them not to  
12 bring that up, moving forward. And they faithfully adhere to  
13 that advice. And that's what happened, as far as the  
14 deprivation of the right to a fair trial.

15 Now, the police also say something that becomes an  
16 insidious thing, because they say, look, your friend was raped.  
17 It's really not that important in the scheme of things, who  
18 cares about that fight. And that thought, that notion, becomes  
19 part of the coverup that not only continues throughout that  
20 police investigation and at that trial, but today, that coverup  
21 continues. And the defendants, these detectives who are likely  
22 going to testify, are gonna get up here and they're going to  
23 lie. And they are going to say we never knew about that --

24 MS. ZGODNY: Objection, your Honor.

25 THE COURT: Sustained. Don't speculate as to what the

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1 witnesses are going to say.

2 MR. GARBER: Okay.

3 The evidence will show, okay, well, you'll hear  
4 testimony from the defendants and you'll make your own  
5 conclusions, about whether or not that is truthful or not.

6 The women will testify, or at least two of them, Miss  
7 Peguero was, after she was convicted and served her sentence  
8 for perjury, she went back to the Dominican Republic. She was  
9 deported. She's not going TO be at this trial. But Maria Sosa  
10 may testify. And Aurora Pujols certainly will testify. And  
11 you'll hear from them. And they're going to vacillate. They  
12 are going to adhere, to some extent, maybe, to their story.  
13 Well, it wasn't that important; we don't know if we said  
14 anything; we don't know if we did or didn't say anything to the  
15 police because, really, it was all about the rape and it wasn't  
16 all that important.

17 But it's a vicious lie. And you are going to hear  
18 that at this trial. Because what happens, and you're going to  
19 hear evidence about this too, is that Ms. Pujols was  
20 interviewed previously. And when her guard was down, she  
21 admitted to a private investigator who was looking into the  
22 case, and volunteered to that person that not only did she know  
23 about the fight, or did the police know about the fight, but  
24 they told the police during those interviews and the police  
25 said, and I quote: It can only -- don't mention it, it can only

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1 affect the case.

2 And it was a recorded conversation. It's something  
3 that she can't deny, and it's something that she can't back out  
4 of, although she may try to.

5 The evidence will show that this fight was a bigger  
6 deal than they probably are now going to say at this trial.  
7 And that the women and the police not only knew about it before  
8 the trial and continued to suppress it, but understood its  
9 significance. In fact, it ultimately got exploited in a  
10 criminal trial in a way that will become very, very apparent to  
11 you.

12 The detectives also went so far as to misrepresent to  
13 the prosecutors conversations that they had with garage  
14 attendants who they interviewed before the trial. And one of  
15 those garage attendants, Pelazo DeLaCruz testified at the  
16 criminal trial.

17 And the information passed on by these defendants to  
18 the prosecutors about their interviews of the garage attendant  
19 was used to unfairly undermine his testimony. He testified  
20 that there was a violent fight, and he was attacked, and the  
21 prosecutor, based on information provided by these individuals,  
22 was able to undermine his credibility and have the jury  
23 believe, okay, that he was lying when he told the jury,  
24 truthfully, that there was, in fact, a fight.

25 And then Detective Diaz testified about his

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1 conversations with that garage attendant, or supposed  
2 conversations, and testified falsely in an effort to undermine  
3 Mr. McCaffrey's right to a fair trial.

4 And you will hear, from the criminal trial, I'm going  
5 to give you one passage. There is many others that show how  
6 the prosecutor was able to exploit the misconduct of these  
7 defendants. She says, this is Shanda Strain, the prosecutor at  
8 Mr. McCaffrey's unfair trial: Because what the defense would  
9 have you believe is, is that they created this entire scenario  
10 to frame a man they have never met --

11 Talking about the women.

12 -- they would have you believe that a friend, upon  
13 finding her in a state of distress and shock, proceeded to beat  
14 the crap out of her. Did anyone else hear this? Punching her,  
15 kicking her. Are you kidding me? This is ridiculous.

16 That argument, which was central to Mr. McCaffrey's  
17 right to a fair trial, was made by the prosecutor. And the  
18 reality is, is that Pelazo DeLaCruz, who testified about that  
19 fight, was testifying truthfully, and it was not ridiculous.  
20 It was, in fact, the truth. And if these officers had done  
21 what they were supposed to do, if they engaged in their  
22 investigation the way they should have, passed off information  
23 that was honest, they didn't influence these women to suppress  
24 evidence --

25 MS. ZGODNY: Objection.

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1 MR. GARBER: -- about that fight, this man would not  
2 have been wrongfully convicted.

3 THE COURT: Is there an objection?

4 MS. ZGODNY: Objection, argumentative.

5 THE COURT: Let's keep this to a preview, not a  
6 summation.

7 MR. GARBER: The evidence will show that this man  
8 would not have been wrongfully convicted of rape and not have  
9 been subjected to the horrific experience he went through for a  
10 crime that he did not commit.

11 Ladies and gentlemen, I urge you to listen closely  
12 throughout this trial, to listen to the evidence, to listen to  
13 what the witnesses say, and to use your common sense and  
14 understand what happened here.

15 And, finally, we are hopeful that the truth will come  
16 out, and this man will be vindicated on another level --  
17 because he is entitled to compensation for what he went  
18 through -- and avoid another tragedy from happening in this  
19 terrible, terrible, line of events.

20 Thank you very much.

21 THE COURT: Okay, thank you, Mr. Garber.

22 We'll now hear from Ms. Zgodny.

23 MS. ZGODNY: Thank you, your Honor.

24 MS. ZGODNY: Good afternoon, ladies and gentlemen. My  
25 name is Vicky Zgodny, and I represent these two detectives,

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1 Detective Robert Arguiso and Detective David Diaz.

2 Now you have heard Mr. Garber talk for a little while  
3 about what the plaintiff believes this case is about, and what  
4 they believe that the evidence is going to show you. But let  
5 me take a step back, and let's talk about why you are here.  
6 You are here for a very limited purpose. You are here for a  
7 very specific purpose. You are here to decide whether these  
8 two detectives, Detective Diaz and Detective Arbuiso hid  
9 information, deliberately hid information about a physical  
10 fight between Ms. Peguero and one of her friends after the  
11 point in time when Ms. Peguero said that she had been raped.  
12 And whether that information about that physical fight would  
13 have changed the outcome of plaintiff's criminal trial.

14 That's why you are here, and the answer to those  
15 questions are, no, these detectives did not hide any  
16 information about a fight. And the information about the  
17 physical fight would not have changed the outcome, would not  
18 have changed the verdict of plaintiff's criminal trial.

19 Now, let me talk about why that is. In this lawsuit  
20 okay, in this lawsuit, you're going to hear about, and you will  
21 be examining, what these detectives learned during their  
22 investigation of the rape. And you are going to hear about,  
23 and you are going to be examining, what the jury and what the  
24 criminal trial heard, and all of the evidence that came out in  
25 that criminal trial against plaintiff. So that's gonna be your

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1 world. So now let me talk about it.

2 Now, you have already heard from plaintiff's counsel  
3 that the victim, Buirny Peguero, has since recanted. She has  
4 since recanted her story about the rape. And as you heard from  
5 Mr. Garber, she was prosecuted and spent time incarcerated, and  
6 she was prosecuted by the same district attorney's office who  
7 prosecuted plaintiff.

8 Now, let me take a step back and let's talk about the  
9 evidence that was presented at plaintiff's criminal trial, and  
10 what these two detectives learned during their investigation  
11 for rape. And what I mean by that, is what these detectives  
12 were told by the witnesses.

13 So let me start off by talking about Buirny Peguero.  
14 Now, what Ms. Peguero had said happened to her, what she told a  
15 jury in that criminal trial -- and by the way, much of this is  
16 what the detectives learned during their investigation of the  
17 rape. And, by the way, much of this is actually not in  
18 dispute. And it's consistent with what plaintiff testified to  
19 at his criminal trial.

20 So let me begin the night of September 18th, 2005,  
21 into the early morning hours. Ms. Peguero and four of her  
22 friends, three women and one man, were out drinking at a  
23 nightclub in Washington Heights. Ms. Peguero had a lot to  
24 drink that night and she was drunk.

25 At about 4:30 in the morning, Ms. Peguero and her

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1 friends went to a restaurant after they left the nightclub to  
2 get some food, use the bathroom, on their way up to New Jersey  
3 where they live.

4 Now, Ms. Peguero and one of her friends, Aurora  
5 Pujols -- and you will hear that name a lot throughout this  
6 trial. And you have already heard it from Mr. Garber's  
7 comments. Ms. Pujols and Ms. Peguero were in the back seat of  
8 Ms. Pujols' car. And their friends were in that restaurant.  
9 They were illegally parked in a bus stop in front of the  
10 restaurant, okay. Another car pulls up. A white Mercedes  
11 containing plaintiff and three of his male friends.

12 So let me set the scene. Ms. Peguero and Ms. Pujols  
13 are in the back seat of their car, drunk and slouched over.  
14 And plaintiff pulls up with three of his guy friends in a white  
15 Mercedes, right next to their car. Now, plaintiff, who was  
16 about 27 years old at the time, approached the car that  
17 Ms. Peguero was in, who by the way was about 22 year old at the  
18 time, and opened the front passenger door. So a total  
19 stranger, uninvited, opens the front passenger car door of Ms.  
20 Pujols' car and proceeded to get into the car. And sat down in  
21 the passenger seat while Ms. Pujols and Ms. Peguero are drunk  
22 in the back seat.

23 Now, according to plaintiff, he was not drunk. Ms.  
24 Pujols and Ms. Peguero were both telling plaintiff to get out  
25 of the car. Ms. Peguero was pushing plaintiff out of the car.

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1 Ms. Pujols has testified, and excuse my language, but she has  
2 testified, and I quote, "Get out of my fucking car." That's  
3 what they are saying to plaintiff. He does not get out of the  
4 car.

5 MR. GARBER: Objection to "they."

6 THE COURT: To "they."

7 MR. GARBER: This is what their version of the  
8 evidence.

9 THE COURT: All right, overruled. Go ahead.

10 MS. ZGODNY: As I was saying, plaintiff did not get  
11 out of the car. Ms. Pujols did get out of her own car and went  
12 inside to the restaurant to tell her friends that some strange  
13 man was sitting in her car and wouldn't get out.

14 Now, plaintiff began having a conversation with Ms.  
15 Peguero. At some point, Ms. Peguero decided that she was going  
16 to park Ms. Pujols' car in a legal parking spot. As I told you  
17 earlier, it was parked in an illegal parking spot in a bus  
18 stop. So, now, she wants to park the car in a legal parking  
19 spot. So here's the scene. Ms. Pujols gets out of the car,  
20 goes into the restaurant with her friends. Ms. Peguero is now  
21 in the driver's seat. Plaintiff is in the passenger seat. And  
22 Mrs. Peguero began driving the car.

23 Now, at some point, the car stops. According to  
24 Ms. Peguero's testimony at the criminal trial, plaintiff pulled  
25 up on the emergency brake, according to plaintiff. He had her

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1 stop the car. Either way, the car stopped. And one of  
2 plaintiff's other friends, who was in that white Mercedes that  
3 I had told you about earlier, got into the car with them. So  
4 now it's Ms. Peguero, this young drunk woman, in the car with  
5 these two men. Now, according to plaintiff at his criminal  
6 trial, he got into the driver's seat. According to  
7 Ms. Peguero, that other friend that got into the car actually  
8 got into the drivers seat. Either way, one of these men took  
9 over that car and began driving it to a parking garage.

10 So as the evidence will show you, Ms. Peguero only  
11 wanted to park her car in a legal parking spot. But these men  
12 took Ms. Peguero, in that car, to a parking garage that was  
13 actually a distance away.

14 And this is what -- all that was said at the criminal  
15 trial. All of what I am saying to you was said at the criminal  
16 trial.

17 Now, plaintiff and his friend park Ms. Pujols' car in  
18 a parking garage. And when they get to the parking garage,  
19 that white Mercedes is also in that parking garage. And it  
20 is two of plaintiff's other friends in that vehicle. So, now,  
21 they have Ms. Peguero get into that white Mercedes with them.  
22 So it's four men, and Ms. Peguero, in that car.

23 Now, according to plaintiff's testimony at the  
24 criminal trial, they actually got into a van. So they switched  
25 from a sedan into a van. But according to Ms. Peguero, they

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1 actually got into that white Mercedes.

2 Now, plaintiff testified at that criminal trial he was  
3 going to take Mrs. Peguero with the rest of her friends to an  
4 after party. Ms. Peguero testified at the criminal trial she  
5 thought they were going to park Ms. Pujols' car in a legal  
6 parking spot, and then take her back to her friends at the  
7 restaurant. But they did not take her back to that restaurant.  
8 They took her further away from the restaurant. And, in fact,  
9 they went in the opposite direction. And, in fact, they went  
10 over a bridge, onto a highway, and they left the Borough of  
11 Manhattan and they left the Borough of Manhattan and they went  
12 into the Bronx.

13 Now, Ms. Peguero at this point testified at her  
14 criminal trial that she was crying and she was afraid. And  
15 this has never been recanted by Ms. Peguero to the district  
16 attorney's office. And by the way, much of it is consistent  
17 with what plaintiff testified to at his own criminal trial.

18 Now, when Ms. Peguero realized that they were not  
19 taking her back to the restaurant, back to her friends, as I  
20 said to you already, she was crying, she was afraid. At this  
21 point, Ms. Peguero is in the back seat of this vehicle with  
22 four men. She's getting phone calls from her friends who are  
23 worried about her. Ms. Maria Sosa and Ms. Aurora Pujols, two  
24 of plaintiff's friends, testified at -- two of Ms. Peguero's  
25 friends -- I apologize. So Ms. Peguero is in the back seat of

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1 the vehicle and getting phone calls from two of her friends,  
2 Maria Sosa and Aurora Pujols. And they testify at plaintiff's  
3 criminal trial. And they testified that they were calling  
4 Ms. Peguero and that Ms. Peguero was crying. And that her  
5 voice seemed shaky. Her friends get on the phone with one of  
6 the men that is in that car, and they tell those men to take  
7 their friend back to that restaurant, to take her back to  
8 Manhattan, otherwise they are calling 911.

9 So Ms. Peguero is in this car with plaintiff and three  
10 of his friends. Now, at some point, one of the men are dropped  
11 off somewhere in the Bronx. So, then, it become Ms. Peguero  
12 with only three men in the car. Originally, as I had said,  
13 there were four men. So now it is Ms. Peguero and these three  
14 men in the car.

15 Now, the person who was dropped off, his name is Mr.  
16 Uribe, was actually the owner of that white Mercedes. Now,  
17 what happened in the back seat of this car at that point,  
18 Ms. Peguero told a criminal jury -- excuse me, a jury at a  
19 criminal trial, I should say -- was a rape. And she has since  
20 recanted that piece. And she has come out and said that no  
21 rape occurred. And she has changed that part of her story.

22 But most of what she testified to, leading up to that  
23 alleged rape, has not changed and is independently corroborated  
24 by other witnesses, including plaintiff's own testimony at the  
25 trial at that criminal trial.

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1 But prior to Ms. Peguero's recantation to the district  
2 attorney's office, prior to Ms. Peguero recanting that rape,  
3 she testified to a jury in a criminal trial about a violent  
4 assault and rape by three men in the car that morning. She  
5 testified about how one of the men threatened her with a knife,  
6 slapped her, bit her, pulled her pants down to her knees, and  
7 forcibly had sex with her. The person that she claimed to have  
8 done this to her was plaintiff.

9 Ms. Peguero testified at that criminal trial, as I  
10 have been talking about, that she was raped in the car. She  
11 testified that plaintiff and his friends, after that rape,  
12 drove her back to the parking garage where they had originally  
13 parked Ms. Pujols' car. It is in that parking garage that  
14 Ms. Peguero is then reunited with her friends.

15 Ms. Peguero' friends Ms. Sosa and Ms. Pujols, who I  
16 have already spoken about, who testified at the criminal trial  
17 as well, they testified at that criminal trial that when they  
18 got back to that parking garage, they saw Ms. Peguero, excuse  
19 me, sitting in Ms. Pujols' car, that she was crying. They saw  
20 mascara running down her face, her hair was a mess, her clothes  
21 were disheveled, her pants were unbuttoned, and her belt buckle  
22 was broken. And what I mean by that, is the chains on her belt  
23 buckle had been broken. And this was not caused by any fight  
24 that occurred later with the friends.

25 Now, this is how her friends find her. You will learn

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Opening - Zgodny

1 that Ms. Peguero was hysterical, she was crying. But at that  
2 point, she would not tell her friends what happened.

3 Now, this is where that physical fight happened. In  
4 that garage, in Ms. Pujols' car, right there, right in this  
5 part of the story that I'm telling you about, is where that  
6 fight happened. So the rape occurred, Ms. Peguero is dropped  
7 off at the garage, her friends find her, and then, in that car  
8 when she is sitting in the car, she gets into the physical  
9 fight with Ms. Pujols.

10 However, neither Ms. Pujols, Ms. Peguero, or Ms. Sosa,  
11 all of the women that I have been talking about, none of those  
12 women testify at that criminal trial about that physical fight.  
13 And what the evidence will show you, is that none of these  
14 women told anyone about that physical fight at any time before  
15 plaintiff's criminal trial; not these detectives, not the  
16 assistant district attorney who was prosecuting the case, and,  
17 in fact, the women described to the ADA who was prosecuting the  
18 case, and her name is ADA Shanda Strain. You will hear a lot  
19 about her throughout this trial. They described to ADA Strain  
20 a verbal fight, a verbal fight that took place in the garage  
21 that morning.

22 Now, Ms. Peguero and her friends head back to New  
23 Jersey after this physical fight appeared in the car, and it is  
24 during that car ride back to New Jersey that Ms. Peguero  
25 informed her friends that she had been raped. The women took

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Opening - Zgodny

1 Ms. Peguero, immediately, to Christ Hospital in New Jersey.

2 When Ms. Peguero got to Christ Hospital, she met with a sexual  
3 assault nurse examiner who conducted the rape kit. The name of  
4 that nurse examiner is Farkhanda Farooqui. You will hear about  
5 nurse Farooqui's testimony because she also testified to that  
6 jury at that criminal trial.

7 Now, nurse Farooqui's testified at that criminal trial  
8 about that interview with Ms. Peguero. She testified that  
9 Ms. Peguero was crying and she was upset. She testified about  
10 Ms. Peguero's injuries. She testified to finding the following  
11 injuries on Ms. Peguero; bite marks and redness on her body,  
12 her arms, shoulders, leg. And she also testified to the  
13 jury -- and, by the way, I think this is what Mr. Garber  
14 referred to as the false evidence. She testified about  
15 Ms. Peguero having a bruise on her pubic area above her vagina.  
16 She told the jury about how she gave the victim a tetanus shot  
17 because of the bite marks and abrasions. She also gave her  
18 antibiotics and Plan B, the morning after pill, to avoid the  
19 unwanted pregnancy.

20 She testified about conducting what you will hear  
21 these defendants refer to as a rape kit, which you will learn  
22 is an invasive physical and vaginal exam, and in which nurse  
23 Farooqui took cervical and vaginal swabs from Ms. Peguero to be  
24 tested for DNA. You will learn that Detective Arbuiso was  
25 provided with this rape kit when he first met with Ms. Peguero,

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Opening - Zgodny

1 and that he had this rape kit sent to a laboratory to be  
2 tested.

3 There was no semen found, but Detective Arbuiso will  
4 tell you that the fact that Ms. Peguero agreed to this rather,  
5 what I described to you already, invasive procedure, suggested  
6 at least to Detective Arbuiso, that a rape had happened.

7 Now, while Ms. Peguero is at Christ Hospital in New  
8 Jersey being examined, she met with a detective in New Jersey.  
9 And her name is Detective Joanne Rak. Detective Rak also  
10 testified at that criminal trial. And she testified that when  
11 she met Ms. Peguero, she was visibly shaken and that she  
12 appeared to be in pain.

13 She testified that she learned from Ms. Peguero that  
14 she had been raped, but that crime occurred in New York City.  
15 So she testified, because the crime occurred in New York and  
16 not New Jersey, she called detectives and Special Victim squad  
17 in Manhattan to refer the case, because it was out of her  
18 jurisdiction.

19 So this is now, for the first time, when my clients,  
20 Detective Arbuiso and Detective Diaz come into this case. So  
21 let me just pause for a minute and tell you what Detective  
22 Arbuiso and Detective Diaz will explain to you in this trial.

23 These detectives were working in the Special Victim  
24 Squad, aimed at sex crimes involving children and adults. So on  
25 that morning, Detective Arbuiso and Detective Diaz received a

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Opening - Zgodny

1 call from that New Jersey detective, Detective Rak about a  
2 young whom who claimed she had been raped.

3 Detective Arbuiso will explain to you that he happened  
4 to be the next one up to receive the next investigation, so he  
5 received that case. He received this rape investigation. And  
6 he asks Detective Diaz to assist him in this investigation.

7 Now, Detective Arbuiso was informed that the victim  
8 was undergoing a rape kit at Christ Hospital in New Jersey.  
9 Detective Rak informed him that they would meet, so that  
10 Detective Rak can provide him with that rape kit, and so that  
11 Detective Arbuiso can take Ms. Peguero and her friends, who are  
12 at the hospital with her, back to the police precinct where  
13 they work, so that they can begin their investigation and they  
14 can interview the witnesses.

15 So you will learn, through Detective Arbuiso and  
16 Detective Diaz, about the steps that they took in their  
17 investigation.

18 So let me just spend a couple of minutes talking about  
19 it. You will learn that Detective Arbuiso and Detective Diaz  
20 met with Detective Rak, as I already described to you, and she  
21 turned over the rape kit and a bag of clothes that was worn by  
22 the victim during, what she described as a rape, which included  
23 that broken belt buckle and her pants, which I have described  
24 for you earlier, when her friends saw her, how her pants were  
25 open. It was that pair of pants that was also provided to

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Opening - Zgodny

1 Detective Arbuiso. So all of this evidence, this rape kit, the  
2 clothing, the broken belt buckle, was all provided to Detective  
3 Arbuiso.

4 Now -- and by the way that was for Detective Arbuiso  
5 to send it to the laboratory to be tested, okay. So now at  
6 this point, Detective Arbuiso and Detective Diaz take  
7 Ms. Peguero and her two friends who were with her, Ms. Sosa and  
8 Ms. Pujols, back to their police precinct so that Detective  
9 Arbuiso can interview them. And Detective Arbuiso was the lead  
10 detective on this case. So he met, by himself, with no other  
11 detectives in the room, with each of these witnesses,  
12 individually.

13 So, first, he met with Ms. Peguero. Then he met with  
14 Ms. Pujols. And then he met with Ms. Sosa.

15 Now, Ms. Peguero told Detective Arbuiso basically what  
16 happened, and basically what we've been talking about, that she  
17 told him how plaintiff got into Ms. Pujols' car, uninvited,  
18 that they did not want her in the car, that she was trying to  
19 push him out of the car, that he drove the car to a parking  
20 garage away from her friends, and that he moved her into  
21 another car, that white Mercedes. Although she described it as  
22 a white luxury vehicle. And that she told Detective Arbuiso  
23 how she was raped in that car by three men.

24 Ms. Pujols and Ms. Sosa told Detective Arbuiso that  
25 when they found Ms. Peguero in that parking garage, that she

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Opening - Zgodny

1 was upset and crying, and that on the car ride home she told  
2 them that she had been raped.

3 Now, what none of these women told Detective Arbuiso  
4 during these interviews, or at any time, and what none of these  
5 women told Detective Diaz at any time, none of these women said  
6 anything about a physical fight that took place between  
7 Ms. Peguero and Ms. Pujols in that parking garage after the  
8 period of time that Ms. Peguero had said that she had been  
9 raped.

10 You will hear from Detective Arbuiso about his  
11 investigation, and the steps that he took to track down  
12 plaintiff. Now, you will remember that Ms. Peguero had said  
13 that the men who raped her were total strangers. So at this  
14 point, they don't have any names. They don't know the name of  
15 William McCaffrey. All they know is a description of this  
16 vehicle that she was placed into where she says that she was  
17 raped.

18 So the detectives go to that garage where those men  
19 had parked Ms. Pujols' car, where they had her get into that  
20 white Mercedes with them. And they were able to get  
21 information about that vehicle that she was in that night,  
22 where she says she was raped. Once the detectives figure out  
23 information about that white Mercedes, about that vehicle, they  
24 were able to track down the car owner, which led them,  
25 eventually, to plaintiff.

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Opening - Zgodny

1           So they go to this parking garage. And they speak  
2 with a Mr. Rodriguez, and DeLaCruz. And you will hear that the  
3 garage attendant never said anything to the detectives about  
4 any physical fight between the women that night. But what one  
5 of them did say, Mr. Rodriguez said, that Ms. Peguero was  
6 hysterical and her friends had to calm her down.

7           Now, plaintiff was brought in for questioning and  
8 admitted to being with Ms. Peguero, but denied that any rape  
9 occurred. Detective Diaz placed plaintiff in a line-up. And  
10 I'm sure most of you are familiar, whether it is from TV or  
11 whatever the other source you're familiar with the term  
12 line-up, or maybe even what it is. But just so I know  
13 everybody knows what I'm talking about when I use that term, a  
14 line-up is when a suspect is placed in a line, whether they are  
15 standing or sitting, with other individuals who match their  
16 same description; so maybe height, weight, et cetera. And  
17 there is a one-way mirror so that the individuals who are in  
18 the line-up in one room, separated by the one way mirror with  
19 the victim or witness to look through, so that they can see,  
20 you know the line-up, but the people in the line-up cannot see  
21 the person who is conducting the identification.

22           So, Detective Diaz will you that he placed  
23 Ms. Peguero -- I'm sorry he placed plaintiff in this line-up,  
24 and that he asked Ms. Peguero and Ms. Pujols to come down to  
25 the precinct to view the line-up.

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Opening - Zgodny

1 Now, Detective Diaz will tell you that he asked  
2 Ms. Peguero, which he got into the observation room, if she  
3 recognized anybody in the line-up. And Detective Diaz will  
4 tell you that Ms. Peguero was visibly shaking and was upset.  
5 She pointed to plaintiff. She identified him as the rapist,  
6 and she collapsed. She collapsed on Detective Diaz, who had to  
7 hold her up. And he almost went down himself.

8 Now, Ms. Pujols also viewed that same identification  
9 line-up right after Ms. Peguero. Because, remember, as I  
10 talked about earlier, Ms. Pujols had seen plaintiff in that  
11 vehicle before she had gotten out of the car. Now Ms. Pujols  
12 did not identify plaintiff in that line-up. And in fact, she  
13 identified somebody else in the line-up, somebody that is  
14 called a filler, okay. It's basically just somebody that  
15 matches the description of the suspect who is in the line-up.  
16 But all of that information, as you will learn, was turned over  
17 to the plaintiff before his criminal trial, and during the  
18 criminal trial that jury heard that Ms. Pujols did not identify  
19 plaintiff. Now, at this point, plaintiff is arrested and  
20 prosecuted by the Manhattan District Attorney's office. So  
21 what that means is that the DA's office brought criminal  
22 charges against plaintiff and presented these charges to a  
23 grand jury.

24 Ms. Peguero testified in the grand jury. Plaintiff  
25 testified in the grand jury. Plaintiff was indicted, which

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Opening - Zgodny

1 means that the grand jury found that there was enough evidence  
2 for the DA's office to proceed against plaintiff for rape,  
3 assault, criminal possession of a weapon, and kidnapping. And  
4 as we've been talking about, this case then proceeded to a  
5 criminal trial.

6 And the Manhattan ADA presented the case to a jury  
7 during that criminal trial. We've been talking a lot about  
8 that.

9 Now, you're going to have the transcripts from that  
10 criminal trial, but let me just remind you that you are not  
11 here to decide what that jury and that criminal case had to  
12 decide. You are not here to decide whether or not anyone has  
13 proven beyond a reasonable doubt that plaintiff committed a  
14 rape. The issue for you is whether these detectives were  
15 informed about a physical fight that occurred between  
16 Ms. Peguero and one of her friends after that period of time  
17 that Ms. Peguero says that she was raped, and whether these  
18 detectives instructed these women not to bring up the physical  
19 fight during the course of plaintiff's criminal prosecution  
20 because it would harm the case. And moreover, whether any of  
21 that would have made a difference in the criminal trial.

22 I told you about several witnesses who testified in  
23 that criminal trial, including Ms. Peguero, her two friends  
24 Ms. Sosa and Ms. Pujols, Nurse Farooqui, Detective Rak that New  
25 Jersey Detective. I told you about, Detective Diaz, Detective

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Opening - Zgodny

1 Arbuiso. But let me talk about what other evidence was  
2 presented during that criminal trial.

3 So, now, after ADA Strain, the prosecutor, presented  
4 her case, the defendant, who at the time the defendant was Mr.  
5 McCaffrey, presented a case, as well. Plaintiff actually took  
6 the stand at his criminal trial and testified in his own  
7 defense. Plaintiff also called his friend, that owner of the  
8 vehicle, that white Mercedes that I talked about earlier, his  
9 name is Mr. Uribe. He also took the stand. Now, you will  
10 learn that plaintiff also called one of the garage attendants  
11 who I talked about earlier, Mr. Pelazo DeLaCruz.

12 Now Mr. DeLaCruz testified at the criminal trial. And  
13 you will learn a few things about his testimony at that  
14 criminal trial. First, Mr. DeLaCruz testified about a physical  
15 fight that took place, that he observed take place, between Ms.  
16 Peguero and her friends in the car in that garage. So remember  
17 the allegation in this lawsuit is that information about a  
18 physical fight would have changed the verdict at that criminal  
19 trial.

20 MR. COHEN: Objection, your Honor. That is not  
21 accurate at all.

22 THE COURT: Overruled.

23 MS. ZGODNY: But Mr. DeLaCruz testified about seeing a  
24 physical fight. So that jury, at that criminal trial, heard  
25 about a physical fight, and they convicted plaintiff.

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Opening - Zgodny

1           Second, Mr. DeLaCruz' name and where he worked was in  
2 my client's investigation file, which was turned over to  
3 plaintiff before that criminal trial.

4           Third, Mr. DeLaCruz was asked at that criminal trial  
5 by ADA Strain if he had met with any of plaintiff's criminal  
6 defense attorneys prior to testifying at that trial, and he  
7 said that, yes, he had met with them, one of them, and told him  
8 what he -- what his testimony was going to be. So plaintiff  
9 and his lawyers knew, prior to that trial, that Mr. DeLaCruz  
10 was going to testify about seeing a physical fight.

11           And let me tell you one other thing that you will  
12 learn, and what the evidence will show you. Mr. DeLaCruz  
13 testified that -- I'm sorry. Let me back up for a second.

14           Sometime after Mr. DeLaCruz testified, ADA Strain  
15 spoke to Ms. Peguero and Pujols and told these women what Mr.  
16 DeLaCruz testified about, that he testified in a trial about a  
17 physical fight between these women in the car in that garage.  
18 And ADA Strain told these women that plaintiff was claiming  
19 that Ms. Peguero's injuries had been caused by that physical  
20 fight between the women.

21           And you will learn, and the evidence will show you,  
22 that Ms. Peguero and Ms. Pujols told ADA Strain that she was  
23 crazy, that that never happened. You will learn that neither  
24 one of these women told ADA Strain that a physical fight  
25 happened. And you will also learn that when ADA Strain

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Opening - Zgodny

1 confronted them with Mr. DeLaCruz' testimony, neither one of  
2 them said, okay, yeah, a physical fight did happen, but the  
3 detectives told us not to say anything. None of that happened.

4 And moreover, you will learn that neither one of these  
5 women told my clients about the physical fight. So what we  
6 know at this point is that everyone believed Ms. Peguero.  
7 Everyone believed that she had been raped.

8 As I told you earlier, nurse Farooqui who examined  
9 Ms. Peguero at the hospital a couple of hours after the rape  
10 had occurred, these two detectives who investigated the rape  
11 case, ADA Strain, who prosecuted the case, the grand jury, the  
12 jury at the criminal trial, and even her friends, her friends,  
13 who are her friends, believed her. Everyone believed her. She  
14 convinced everyone.

15 (Continued on next page)

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E4SUMCC2

Opening - Ms. Zgodny

1 MS. ZGODNY: So we are here because plaintiff was  
2 convicted of rape, assault, criminal possession of a weapon,  
3 unlawful imprisonment and kidnapping and three years later  
4 Ms. Peguero recanted. She was prosecuted by the District  
5 Attorney's office and she spent time incarcerated. She  
6 recanted and she said that the rape did not happen. And what I  
7 mean by that is that she said that nobody attacked her or raped  
8 her in the car that night when they had driven up to the Bronx.

9 The plaintiff was released from prison and his  
10 conviction was overturned. As an aside, you will hear that  
11 plaintiff spent time incarcerated prior to this criminal  
12 prosecution, and since his conviction has been overturned, he  
13 has been convicted of felony assault and felony criminal  
14 possession of a weapon.

15 Let me get back to what I talked about at the very  
16 beginning of my remarks. The question for you to decide in  
17 this lawsuit is whether my clients suppressed information about  
18 a fight that occurred between Ms. Peguero and Ms. Pujols after  
19 the period of time when Ms. Peguero said that she had been  
20 raped. And what plaintiff is claiming here is that these women  
21 told these detectives about that physical altercation and that  
22 these detectives hid that information and said not to say  
23 anything. And you are here to decide whether these two veteran  
24 detectives, knowingly suppressed evidence of this physical  
25 fight or hid evidence of this fight during plaintiff's criminal

E4SUMCC2

Opening - Ms. Zgodny

1 prosecution and whether the evidence of this fight would have  
2 changed the verdict at that criminal trial.

3 So let me repeat that. Whether the evidence of that  
4 physical fight would have changed the verdict --

5 MR. COHEN: I object again.

6 THE COURT: Let's not get into -- I am going to  
7 instruct the jury as to what the law is and what they are going  
8 to be asked to find, but right now just about what the evidence  
9 will show.

10 MS. ZGODNY: Yes, your Honor.

11 The defendants believe that once you have heard all of  
12 the witnesses in this trial and you have seen and heard all of  
13 the evidence, that you will find that these detectives did not  
14 do anything wrong and you will render a verdict in our favor.

15 Thank you.

16 THE COURT: Thank you.

17 We will now, I would say, hear from your first witness  
18 but I think that we are going to do what you described in your  
19 opening, Mr. Garber, with respect to the trial transcript?

20 MR. GARBER: Yes.

21 MR. COHEN: Could I make a short record noting what  
22 the objection was?

23 THE COURT: We can do that after. I think that I want  
24 to now start the evidence.

25 MR. GARBER: I think that we are borrowing documents

E4SUMCC2

Opening - Ms. Zgodny

1 from the defendants' counsel. Is it possible to take a  
2 five-minute recess just so that we can set things up?

3 THE COURT: I would rather not do it now.

4 Do the jurors need a break?

5 You need a break.

6 Let's take a short break of about five minutes to use  
7 the bathroom, and then we will go until about 5:30 today.

8 All rise for the jury.

9 Don't discuss the case. Keep an open mind.

10  
11 (Continued on next page)  
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E4SUMCC2

Opening - Ms. Zgodny

1 (Jury not present)

2 MR. COHEN: Could I state my objection while they are  
3 gone?

4 THE COURT: Yes.

5 MR. COHEN: The opening of the defendants suggested  
6 that the only way that Mr. McCaffrey could prevail is if the  
7 jury would have acquitted him at the trial, if there was a  
8 different verdict. That is not the law. The law is, he  
9 prevails if there was an unfair trial which your Honor has  
10 already ruled, that a trial whose outcome has a lack of  
11 confidence -- the jury may have still convicted him, but it  
12 still would have been an unfair trial and I think that that was  
13 misleading to the jury.

14 THE COURT: There is going to be an instruction on the  
15 law with respect to what prejudice would need to be  
16 established. So I am not sure that I am going to agree with  
17 either of you with respect to how you want to phrase it but,  
18 again, for an opening, it is really about what the evidence is  
19 going to show. So I sustained the last objection because I  
20 really don't want the lawyers to be getting into my charge, my  
21 instructions on the law in the opening. I will certainly give  
22 you a copy of my instructions before summations so that there  
23 will be no dispute as to what I am saying and I will give you  
24 all an opportunity to be heard on that subject. So I  
25 understood the gist of that objection.

E4SUMCC2

Opening - Ms. Zgodny

1 MR. COHEN: I really think that there ought to be a  
2 curative instruction that at least that whatever statements  
3 were made about the law -- ideally, I would like you to say  
4 that it is not necessary for the burden at the criminal  
5 trial -- the question is, was the trial fair.

6 THE COURT: I have not instructed them on the law so I  
7 am not going to do it.

8 How long is it going to take us to set up for this  
9 first phase of the evidence?

10 MR. GARBER: Two minutes.

11 (Recess)

12  
13 (Continued on next page)

E4SUMCC2

Opening - Ms. Zgodny

1 (Jury present)

2 THE COURT: The cafeteria screwed up. We had ordered  
3 cookies, fruit, beverages for this afternoon. We apologize.  
4 Hopefully, tomorrow we will work out the Kinks, but my  
5 apologies.

6 One other thing, always take your notebooks with you.  
7 Don't leave them out here. I was here so nobody saw them or  
8 fiddled with them, but I think it is better if you bring them  
9 with you each time that you come in and out.

10 So now we are going to begin with the evidence portion  
11 of the trial. As I told you before, the opening statements of  
12 the lawyers are not evidence; they are just previews.

13 For the presentation of evidence the plaintiff's goes  
14 first with the plaintiff's case. I think, as Mr. Garber  
15 explained, there are going to be portions of the transcript  
16 from the criminal trial that are now read into the record. So  
17 they will be made part of the case. You can have copies of the  
18 transcript, but they will be read into the record now.

19 Mr. Garber, we are all set?

20 MR. GARBER: Yes.

21 THE COURT: Mr. Cohen, you are going to be in the  
22 witness box reading the portions of the transcripts that relate  
23 to the witness on the witness stand at the criminal trial,  
24 correct?

25 MR. GARBER: Correct.

E4SUMCC2

"Maria Sosa"

1 THE COURT: And, Mr. Garber, you are going to be  
2 reading the part of the lawyer doing the direct examination  
3 which was the Assistant District Attorney?

4 MR. GARBER: Yes. I will preface each section. This  
5 is the direct examination by Shandra Strain, the prosecutor in  
6 the criminal trial, and the witness on the stand is Maria Sosa.

7 THE COURT: You are Shandra Strain.

8 MR. GARBER: He is Maria.

9 THE COURT: They are method actors, so this should be  
10 fine.

11 Let's proceed.

12 MR. GARBER: Page 56, we are starting.

13 (Mr. Garber and Mr. Cohen reading)

14 "Q Maria, how old are you?

15 A. 25.

16 Q. You currently live in New Jersey?

17 A. Yes.

18 Q. How long have you lived in New Jersey?

19 A. Approximately two years now.

20 Q. Where did you live before that?

21 A. Florida.

22 Q. Where were you raised?

23 A. New York.

24 Q. Do you work, Ms. Sosa?

25 A. Yes.

E4SUMCC2

"Maria Sosa"

1 Q. What do you do for a living?

2 A. Receptionist.

3 Q. How long have you been doing that?

4 A. For about a year.

5 Q. Do you know a woman by the name of Biurny Peguero?

6 A. Yes.

7 Q. Do you refer to her as a different first name?

8 A. Yes.

9 Q. What do you refer to her as?

10 A. Mary.

11 Q. How do you know Biurny Peguero?

12 A. Close friend of mine.

13 Q. Approximately how long have you known her?

14 A. I would say for about five years.

15 Q. How would you classify your friendship with Biurny Peguero?

16 A. Very close.

17 Q. I'd like to direct your attention to September 18th, 2005.

18 Do you remember that date?

19 A. Yes.

20 Q. Who were you with on that night?

21 A. A group of friends and a -- may I name them?

22 Q. Go ahead.

23 A. OK. It's Aurora, Mary, Orlando, Heliana and myself.

24 Q. And what were you guys doing that night?

25 A. We were out clubbing.

E4SUMCC2

"Maria Sosa"

1 Q. Do you remember what club you went to?

2 A. Yes, it was Umbrella Lounge.

3 Q. And is that located here or in the County of New York?

4 A. Yes.

5 Q. Do you know what general vicinity it's located in?

6 A. It's in Dyckman, the Dyckman area.

7 Q. How did you guys get to Umbrella Lounge that night?

8 A. We -- we drove in Aurora's car.

9 Q. Who drove the car to the club?

10 A. Aurora.

11 Q. And who went with you to the club?

12 A. In the car, it was -- in the vehicle, it was Aurora  
13 driving. I was on the passenger's side, Mary in the back and  
14 Heliana.

15 Q. Do you know Heliana very well?

16 A. Yes.

17 Q. How do you know Heliana?

18 A. She's a cousin of Aurora.

19 Q. When was the last time you saw Heliana?

20 A. I believe it was the day we testified -- sorry -- the day  
21 of that incident.

22 Q. OK.

23 And when was the last time that you saw Orlando?

24 A. That same night as well.

25 Q. Have you spoken to either of them since then?

E4SUMCC2

"Maria Sosa"

1 A. No.

2 Q. Do you know where either of them are today?

3 A. No.

4 Q. Do you remember if any photographs were taken of the guys  
5 earlier that night when you were at the club?

6 A. Yes.

7 Q. I'm showing you what I previously marked as People's 1 for  
8 identification, can you take an look at People's 1?

9 Can you take a look at People's 1?

10 A. Yes."

11 MR. GARBER: Your Honor, just so that you know, we do  
12 not have pictures. They were not provided, so they are not  
13 going to be shown, and that is going to come up throughout. I  
14 am just letting you know.

15 THE COURT: What we are reading into the record now is  
16 the transcript. The parties have stipulated to this. Does it  
17 have a document number?

18 MR. GARBER: It is People's 1.

19 THE COURT: I mean, for this trial. We are going to  
20 use this exhibit. This is going to be available?

21 MR. LARKIN: Yes, your Honor. We are going to have a  
22 binder prepared by the time that the parties sum up.

23 MR. GARBER: You mean these transcripts?

24 THE COURT: Yes.

25 MR. LARKIN: We will have a binder prepared for the

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"Maria Sosa"

1 jury and we will mark it as a plaintiff exhibit number.

2 THE COURT: We are reading from a document. This is  
3 in evidence, so we are calling this what? Plaintiff's 1?

4 MR. GARBER: Plaintiff's 70 is what it would be.

5 THE COURT: Then Plaintiff's 70 is the transcript from  
6 the criminal trial. It is in evidence. The parties have  
7 stipulated to it. We are reading it now so that you can hear  
8 it. It will also be available to you in the jury room should  
9 you wish to review it during your deliberations. We are going  
10 to call it Plaintiff's 70, but as I said I will give you a list  
11 of all of the exhibits by their number and a brief description.

12 (Plaintiff Exhibit 70 received in evidence)

13 MR. GARBER: Thank you.

14 (Mr. Garber and Mr. Cohen reading)

15 "Q Can you take a look at People's 1?

16 A. Yes.

17 Q. Do you recognize that?

18 A. Yes.

19 Q. What do you recognize that to be?

20 A. It was a picture taken of us at Umbrella Lounge.

21 Q. OK.

22 Who does that picture depict?

23 A. It is Mary on the left-hand side -- can I show it?

24 Q. One second.

25 A. It's Mary on the left-hand side, the one next to her, the

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"Maria Sosa"

1 one following is Aurora, and the last one on the right-hand  
2 side is Heliana.

3 Q. Does that picture fairly and accurately show the way you  
4 guys looked that night at the Umbrella Lounge?

5 A. Yes."

6 MR. GARBER: Page 62 by the way, bottom.

7 (Mr. Garber and Mr. Cohen reading)

8 "Q Can you turn that picture so that we can see, all see, it  
9 now and can you tell us who's who in that photograph?

10 A. This is Mary.

11 Q. And you're pointing to the right-hand side of the photo?

12 A. Right.

13 Q. OK.

14 Next to Mary?

15 A. Next to Mary is me.

16 Q. Mm hmm.

17 A. Then it's Aurora.

18 Q. OK.

19 A. The last one here is Heliana.

20 Q. Approximately what time did you arrive at the Umbrella  
21 Lounge that night?

22 A. It was around 1:00 a.m.

23 Q. And how long approximately did you stay at Umbrella Lounge?

24 A. For, I would say, three hours and a half.

25 Q. OK.

E4SUMCC2

"Maria Sosa"

1 Did you have anything to drink that night?

2 A. No.

3 Q. Was there a designated driver for the four of you?

4 A. Yes, myself.

5 Q. Did you drink anything before you arrived at the club?

6 A. No.

7 Q. And what about after you left?

8 A. No.

9 Q. Approximately what time did you leave Umbrella Lounge that  
10 night?

11 A. 4:30 a.m.

12 Q. Where did you go when you left the club?

13 A. Towards the car.

14 Q. OK.

15 What did you do once you got to the car?

16 A. I was the one driving, I was on the driver's side. Heliana  
17 was on the passenger's side. Aurora was behind the passenger's  
18 side. And Mary was behind the driver's side.

19 Q. Was anyone else with you at that time?

20 A. Yes, Orlando.

21 Q. How would you describe yourself when you left the club that  
22 night? What was your state of mind?

23 A. I was conscious and sober.

24 Q. OK.

25 Where did you guys go once you got into the car?

E4SUMCC2

"Maria Sosa"

1 A. We were driving towards New Jersey, our home, and we  
2 stopped at a restaurant on our way that was actually in the  
3 same direction we had to take the highway home.

4 Q. Do you recall where the restaurant was located?

5 A. Yes, it's -- its the corner of Dyckman and Broadway.

6 Q. And approximately what time did you arrive at the  
7 restaurant?

8 A. I would say around 4:45.

9 Q. Where did you park the car when you arrived at the  
10 restaurant?

11 A. Right in front of the restaurant. It was a bus stop.

12 Q. Was the car parked legally?

13 A. No.

14 Q. What happened once you all arrived at the car? What did  
15 you all do?

16 A. Well, I believe Mary and Heliana went into the restroom in  
17 the restaurant, came back into the car. At that point, myself,  
18 Orlando and Heliana went back into the restaurant leaving  
19 Aurora and Mary inside the car.

20 Q. Is that restaurant located still in the County of New York?

21 A. Yes.

22 Q. What did you do with the keys to the car when you went into  
23 the restaurant?

24 A. They were left in the ignition.

25 Q. Where was Biurny seated, or Mary, when you were in the

E4SUMCC2

"Maria Sosa"

1 restaurant when you left to go in?

2 A. The backseat behind the driver's seat.

3 Q. And where was Aurora?

4 A. Backseat behind the passenger's side.

5 Q. How were the car doors, were they locked or unlocked?

6 A. Unlocked.

7 Q. And what about the windows, do you recall if they were up  
8 or down?

9 A. I believe they were up.

10 Q. I'm showing you what's already been admitted into evidence  
11 as People's 3 and 31.

12 Do you recognize the photographs and what they depict  
13 in People's 3 and 31?

14 A. Yes.

15 Q. What do you recognize those to be?

16 A. A picture of the restaurant where we stopped.

17 Q. Can you, using either one of those, 3 or 31, just tell us  
18 which one you're using, can you show us where the car was  
19 parked when you went into the restaurant to get food?

20 A. OK. Using picture 3 --

21 Q. Mm hmm.

22 Can you show us so we can see?

23 A. OK. This is the restaurant here.

24 Q. OK.

25 A. We were parked right here.

E4SUMCC2

"Maria Sosa"

1 Q. OK.

2 So you're pointing in the middle, right in front of --

3 A. Right in front of where the bus stop begins, that's right.

4 Q. Did there come a point, Ms. Sosa, when Aurora came into the  
5 restaurant?

6 A. Yes.

7 Q. Can you describe for us what happened when she came into  
8 the restaurant?

9 A. She said there was -- there were guys inside the car. She  
10 numerated them as three guys. She said three guys were in the  
11 car and she was able to get out of the car.

12 Q. And where was Mary when she was telling you this?

13 A. She was still inside the car.

14 Q. And what happened next? What did you do next?

15 A. Well, we went back outside -- well, she had told Aurora --  
16 well, OK, let me go back. Sorry about that.

17 When we asked her what do you mean there's three guys  
18 inside the car, she said: Oh, yeah, there's three guys, you  
19 know. We started calling Mary's cell phone. At one point she  
20 picked up and said: I will be there in five minutes, I went to  
21 park the car.

22 Q. Let me stop you. Let me back up.

23 A. OK.

24 Q. When you were in the restaurant, did there come a point  
25 when you walked out of the restaurant?

E4SUMCC2

"Maria Sosa"

1 A. Yes.

2 Q. And what happened when you walked out? What did you  
3 observe?

4 A. The vehicle wasn't there.

5 Q. Did you see Biurny at that point?

6 A. No.

7 Q. Did you see any guys at that point?

8 A. No.

9 Q. OK.

10 Did you have any idea where she was at that point?

11 A. No.

12 Q. Did you ever see the car pull away from the restaurant?

13 A. No, I was inside the restaurant.

14 Q. What happened after you called Biurny on her cell phone?

15 A. That's when she said that she would be back in five  
16 minutes.

17 Q. And what did you guys do next?

18 A. We waited for awhile.

19 Q. And what happened after that?

20 A. We continued to call.

21 Q. Could you hear anything in the background when you made  
22 those phone calls?

23 A. Voices.

24 Q. Were those voices male voices or female voices?

25 A. Male voices.

E4SUMCC2

"Maria Sosa"

1 Q. And approximately how much time past when you were making  
2 these phone calls?

3 A. I would say like five minutes.

4 Q. What did you do next after she told you she'd be back in  
5 five minutes and she didn't come back?

6 A. We waited for awhile. We continued to call after that and  
7 I noticed when we spoke to her she was nervous, her voice was  
8 shaky.

9 Q. Could you hear anything else when you were speaking to her?

10 A. Just voices in the back.

11 Q. Did there come a point that you called her phone and other  
12 things began happening?

13 A. Yes.

14 Q. Can you describe for us what those were?

15 A. The crying.

16 Q. Who was crying?

17 A. She was.

18 Q. Were you able to speak to her?

19 A. Yes.

20 Q. And what did you learn as you were speaking to her?"

21 MR. GARBER: It picks up on 72.

22 (Mr. Garber and Mr. Cohen reading)

23 "Q When you were calling her phone, what did you hear  
24 whenever the phone would get picked up?

25 A. She was crying.

E4SUMCC2

"Maria Sosa"

1 Q. And did there come a time that you spoke to other people in  
2 the car?

3 A. Yes.

4 Q. And what type voice was it?

5 A. It was a male voice.

6 Q. What did they tell you?

7 A. That they would take her back.

8 Q. And what happened next?

9 A. I -- I actually told them that I was going to call the  
10 cops.

11 Q. Could you hear Biurny at that point?

12 A. Yes, she was crying in the back.

13 Q. What did you do after you spoke to one of the men in the  
14 car at that point?

15 A. We called the police.

16 Q. And did you know where she was at that point in time?

17 A. No.

18 Q. Did you have any idea exactly how many people were in the  
19 car at that time?

20 A. No.

21 Q. Had you --

22 A. I'm sorry.

23 Q. At that point when you called 911, did you know how many  
24 people were with Mary?

25 A. I assumed there was more than one person because I heard a

E4SUMCC2

"Maria Sosa"

1 variety of voices.

2 Q. But you actually didn't know --

3 A. The amount, no.

4 Q. When you guys were calling her on her cell phone, whose  
5 phones were you using?

6 A. Orlando's and Heliana's.

7 Q. Did you actually call 911 that night?

8 A. Yes.

9 Q. At what point in the night did you call 911?

10 A. After I had spoken to someone, the male voice on Mary's  
11 phone number.

12 Q. And at that point in which you called 911, did you know  
13 where she was at all?

14 A. No.

15 Q. How long after you had spoken to the guy and heard her  
16 crying did you call 911?

17 A. I would say like two seconds afterwards."

18 MR. GARBER: We pick up on 80, line 10.

19 MR. COHEN: 80?

20 MR. GARBER: 80.

21 (Mr. Garber and Mr. Cohen reading)

22 "Q Ms. Sosa, after you spoke to those men on the phone, what  
23 did you do next?

24 A. I'm sorry, could you repeat the question?

25 Q. When --

E4SUMCC2

"Maria Sosa"

1 Before we took a break, you were talking about how you  
2 called Biurny on the phone?

3 A. Right.

4 Q. And you spoke to a man on the phone as well?

5 A. Yes.

6 Q. What did you do after SU spoke to them?

7 A. We called 911.

8 Q. OK.

9 And who were you with when you called 911?

10 A. Orlando, Heliana, Aurora and myself.

11 Q. I'm showing what I previously marked as People's 30 for  
12 identification.

13 Do you recognize People's 30?

14 A. Yes.

15 Q. What do you recognize that to be?

16 A. The recording of the call we placed to 911.

17 Q. How do you know that?

18 A. I initialed and signed it.

19 Q. OK.

20 Have you heard that prior to testifying here?

21 A. Yes.

22 Q. And when was that?

23 A. This morning.

24 Q. Ms. Sosa, when you called 911, the tape that you just  
25 heard, who is the first person on the tape?

E4SUMCC2

"Maria Sosa"

1 A. That's Heliana.

2 Q. And who was the second voice on that tape?

3 A. Myself.

4 Q. OK.

5 And when you called 911, what car did you think Biurny  
6 Peguero was in?

7 A. Aurora's car was the tan Honda Civic that I described.

8 Q. And did you know exactly how many people were in the car at  
9 that point?

10 A. No.

11 Q. When you were calling Biurny's cell phone, was Heliana and  
12 Orlando and Aurora also with you?

13 A. Yes.

14 Q. And did any of them speak to her away speak to the men, if  
15 you know?

16 A. I was the only that spoke to someone on the phone.

17 Q. And what happened after you called 911?

18 A. We continued to call, just to see if she was OK.

19 Q. And did she answer every time?

20 A. She answered not all the time.

21 Q. What happened --

22 Can you take us what happened when you called the  
23 various times? What would occur?

24 A. The various times I called, let's say four out of five  
25 calls, she would pick up two and she would just cry on the

E4SUMCC2

"Maria Sosa"

1 phone.

2 Q. And what happened as you continued making these phone  
3 calls?

4 Did there come a time when you went to look for her?

5 A. Yes.

6 Q. How did that come about?

7 A. In one of the phone calls we made, I spoke to a male on the  
8 phone and he said: We're taking her there, we're taking her  
9 there. I asked him: Where. He gave me a location, which I  
10 don't remember, and we jumped in a cab, all of us.

11 Q. And where did you go once you got in the cab?

12 A. To the location he had told me on the phone.

13 Q. And do you remember that location today?

14 A. No.

15 Q. OK.

16 What did you guys do once you got into that cab?

17 A. We headed towards the location.

18 Q. And what happened as you went to that location?

19 A. They were -- there was no car to be seen.

20 Q. So what happened next?

21 A. We continued to call.

22 Q. And then what happened?

23 A. And the male kept -- I mean that male kept on, you know,  
24 picking up the phone and saying that: We're going to take her  
25 there, we're going to take her there. And after that, we

E4SUMCC2

"Maria Sosa"

1 continued to call, because I mean, you know, he would say: I'm  
2 going to take her to the location I told you. And he never  
3 arrived. We waited there for awhile.

4 Q. What happened?

5 Did there come a point where you eventually found  
6 Biurny?

7 A. Yes.

8 Q. And where was that?

9 A. In a parking lot.

10 Q. Was that in the County of New York?

11 A. Yes.

12 Q. Can you tell us how you found her in that parking lot?

13 A. He -- since we continued to call, at one point she answered  
14 the phone at -- you know, I'm assuming she was alone at that  
15 point.

16 Q. What happened when they answered the phone that time?

17 A. She was still crying and we asked her: Where are you. She  
18 said: I'm in a parking lot. She asked one of the parking lot  
19 attendants to give them address and that's how -- we told the  
20 cab driver to drive us over to the parking lot where she was  
21 at.

22 Q. And did you speak to the parking lot attendant?

23 A. Yes.

24 Q. And did you go to that location?

25 A. Yes.

E4SUMCC2

"Maria Sosa"

1 Q. What happened when you arrived at that parking garage?

2 A. Aurora's car was parked right in front of the attendance  
3 booth in the entrance of the parking lot and Mary was inside  
4 the car.

5 Q. And what did you observe about her when you saw her sitting  
6 in the car?

7 What did you observe about Biurny when you approached  
8 her in the car?

9 A. She was crying, her makeup looked smeared, her hair was  
10 messed up, her pants were undone and her belt was torn.

11 Q. Did you see Biurny earlier in the night?

12 A. Of course.

13 Q. And did you see her when you were at the restaurant?

14 A. Yes.

15 Q. Did you have an opportunity to view her as a whole, her  
16 entire body?

17 A. Yes.

18 Q. Were her pants undone when she came out of the restaurant  
19 and got in the car?

20 A. No.

21 Q. Was her belt broken when she came out of the restaurant?

22 A. No.

23 Q. Was her makeup smeared?

24 A. No.

25 Q. Was she crying?

E4SUMCC2

"Maria Sosa"

1 A. No.

2 Q. Was her hair messed up?

3 A. No.

4 Q. Approximately how long was she missing for?

5 A. I would say for more than two hours.

6 Q. What makes you say that?

7 A. When we -- when the incident occurred, when they, you know,  
8 when they took the car from in front of the restaurant, it was  
9 still night and when we actually reached her at the parking  
10 lot, it was already daylight. So I would say it was more than  
11 two hours.

12 Q. When you were in the parking garage, was there a time when  
13 uniformed police officers arrived at the garage?

14 A. Yes.

15 Q. Did you speak to those officers?

16 A. No.

17 Q. Did you see whether or not Biurny spoke with those  
18 officers?

19 A. No.

20 Q. What was Biurny doing? How was she behaving when you  
21 arrived at the parking garage? What was her demeanor?

22 A. She was just crying hysterically.

23 Q. Backing up to earlier in the evening when you were at the  
24 club and at the restaurant with Biurny, did you notice -- well,  
25 what was she wearing that night? What kind of top was she

E4SUMCC2

"Maria Sosa"

1 wearing?

2 A. A halter top.

3 Q. Could you see her arms?

4 A. Yes.

5 Q. Could you see her shoulders?

6 A. Yes.

7 Q. Did you notice at any point in the night whether or not  
8 before she went missing if she had any injuries to her body?

9 A. There was none on her body.

10 Q. Did there come a point when Biurny told all of you that she  
11 had been raped?

12 A. Yes.

13 Q. When did that occur?

14 A. Inside of the vehicle driving back to Jersey.

15 Q. And did she tell you who had raped her?

16 A. She just said it was three guys.

17 Q. Did she tell that all three had raped her?

18 A. No.

19 Q. Did she say --

20 Who was there when she told you that she had been  
21 raped?b

22 A. Orlando, Aurora, Mary and myself.

23 Q. Was Heliana still present?

24 A. No.

25 Q. What did you do next?

E4SUMCC2

"Maria Sosa"

1 A. We went to the hospital.

2 Q. And where's that hospital located, in New York?

3 A. In New Jersey.

4 Q. In New Jersey.

5 How long were you at the hospital approximately?

6 A. Four to five hours.

7 Q. When you were at the hospital, did there come a point when  
8 you noticed any injuries to Biurny?

9 A. Yes.

10 Q. What kind of injuries did you notice?

11 A. She had bruises on her arms.

12 Q. I'm showing you People's Exhibits 6 through 15 which are  
13 marked for identification.

14 Ms. Sosa, could you please take a look at People's  
15 Exhibit 6 through 15 and let me know when you're done looking  
16 at them.

17 A. Done.

18 Q. Do you recognize those photos?

19 A. Yes.

20 Q. What do those photos depict?

21 A. Bruises on Mary's arms and shoulder and legs, I think.

22 Q. Do those photos fairly and accurately depict the injuries  
23 that you saw that night in the hospital?

24 A. Yes.

25 Q. Were you present when the detective took those photographs?

E4SUMCC2

"Maria Sosa"

1 A. Yes."

2 MR. GARBER: At this time the photographs were  
3 received into evidence.

4 (Mr. Garber and Mr. Cohen reading)

5 "Q Ms. Sosa, in those photographs that you just looked at,  
6 were any of those injuries on Ms. Peguero when you last saw her  
7 at the restaurant?

8 A. No.

9 Q. I just want to back up. I have one last question for you.

10 When Ms. Peguero told you she had been raped, did she  
11 tell you when she had been raped?

12 A. While she was missing.

13 Q. I have no further questions."

14 MR. GARBER: Now this is cross-examination of Ronald  
15 Veneziano.

16 THE COURT: You are going to play that role?

17 MR. GARBER: Yes. I am now Mr. Veneziano, same  
18 witness, Ms. Sosa.

19 (Mr. Garber and Mr. Cohen reading)

20 "Q Ms. Sosa, you say that the first time the alleged victim  
21 claimed she was raped was in the car with you going back to  
22 Jersey?

23 A. I'm sorry, can you repeat that for me?

24 Q. Did you not testify that Biurny said to you, words to the  
25 effect, she had been raped and he told you that while she was

E4SUMCC2

"Maria Sosa"

1 in the car going back to Jersey with you, previously that  
2 evening she had been raped?

3 A. She said that when we were in the car going back to jersey.

4 Q. Right.

5 A. Yes.

6 Q. You were in the car, she's in the car, the others are in  
7 the car, you're going to Jersey and it was on that trip to  
8 Jersey she mentioned to you that earlier in the evening she had  
9 raped?

10 A. No. You are confusing me. You're confusing me. When we  
11 were driving back to Jersey after we met her at the parking  
12 lot, she mentioned to us that she had been raped in the time  
13 that she was missing. When she was missing, when she was taken  
14 in the car prior on that evening, earlier in that evening, yes.

15 Q. So the first time that she told you that was not in the car  
16 ride back to the New Jersey but it was when you were all  
17 together in the parking lot?

18 A. We were riding back to Jersey. That's when she told us she  
19 was raped.

20 Q. That's the first question that I asked you.

21 A. And -- yes, that's what I'm telling you. We were in the  
22 car driving back to Jersey, yes.

23 Q. What did she --

24 She just said out of the clear blue sky I was raped?

25 A. No, we were all trying to comfort her. She was crying all

E4SUMCC2

"Maria Sosa"

1 the way to Jersey. We were asking her questions, what  
2 happened, what did they do to you, you know, and that's when  
3 she told us what happened.

4 Q. What approximately was the time was the time that everybody  
5 arrived at the Umbrella?

6 A. 1:00 a.m.

7 Q. 1:00 a.m.

8 And what was the approximate time that pretty much  
9 everyone left the Umbrella?

10 A. 4:30.

11 Q. 4:30?

12 A. Leaving Umbrella, yes.

13 Q. So everyone was at the Umbrella for approximately three,  
14 three and a half hours?

15 A. Yes.

16 Q. And as the designated driver, I guess you're in a position  
17 to watch and see who was drinking, who was not, how much they  
18 are drinking?

19 A. Can you repeat the question.

20 Q. Yes.

21 As the designated driver, as one who herself was not  
22 drinking -- by the way, was that true, that you, yourself, were  
23 not drinking at all that night?

24 A. I was not drinking at all that night.

25 Q. And that was because you were the designated driver?

E4SUMCC2

"Maria Sosa"

1 A. Right, I was, yes.

2 Q. Now, the Umbrella has a drink, does it not if you know,  
3 it's called the Blue Hawaiian? You heard that term, that  
4 drink?

5 A. Yes, that is a common drink, yes.

6 Q. OK. Do you know what that drink consists of in terms of  
7 alcohol?

8 Have you, yourself, ever had a Blue Hawaiian?

9 Were you in a position what Biurny had to drink that  
10 evening for that three and a half hours?

11 A. Was I in the position of --

12 Q. Yeah. Were you, like, even though you were the designated  
13 driver, were you seated at the same table?

14 A. Yeah, we were all together at the same table, yes.

15 Q. OK.

16 And except for yourself as the designated driver, the  
17 others were drinking?

18 A. Right.

19 Q. Was Biurny drinking?

20 A. Yes.

21 Q. Now, in that time period, that three and a half hour time  
22 period, how many drinks would you recollect that she had?

23 A. I don't know.

24 Q. You have no idea?

25 A. No.

E4SUMCC2

"Maria Sosa"

1 Q. Now, you said a few moments ago that you were familiar with  
2 a term Blue Hawaiian --

3 A. Yes.

4 Q. -- correct. OK.

5 Now, you said yes and you nodded your head. Is  
6 that -- isn't that what they were drinking at the table for  
7 three and a half hours, a Blue Hawaiian?

8 It's a drink that's got vodka in it for one thing,  
9 isn't that right?

10 A. Yes.

11 Q. And were others drinking anything else other than Blue  
12 Hawaiians?

13 A. Honestly.

14 Q. Yeah.

15 A. I didn't keep track of what everyone else was drinking  
16 because I wasn't drinking. I just knew I was responsible for  
17 driving everyone safely home.

18 Q. But you now know, thinking about it, that the others were  
19 drinking? Blue Hawaiians?

20 A. Yes.

21 Q. Over the course of the three and a half hours, how many  
22 Blue Hawaiians, if you can remember exactly or if not  
23 approximately, how many Blue Hawaiians did she drink?

24 A. I don't know that answer.

25 Q. Hm?

E4SUMCC2

"Maria Sosa"

1 A. I don't know.

2 Q. But you know that when she left the restaurant she was  
3 pretty much drunk, wasn't she?

4 A. She was.

5 Q. And -- withdrawn.

6 Do you know who first mentioned that all three of the  
7 men raped her that evening?

8 A. I'm sorry?

9 Q. Did you hear from anyone --

10 A. That all three men raped her?

11 Q. Yeah. Did you hear anything of that nature?

12 A. No.

13 Q. No one told you that?

14 A. No one told me three men raped her.

15 Q. Well, did --

16 Was there any time during that evening when she  
17 herself was back in your car that she said it herself?

18 A. Three men did take her in the car.

19 Q. Right.

20 A. But she emphasized that two of them, one holding her and  
21 the other one raped her.

22 Q. But there were three men.

23 A. Right. The other one she aid did not touch her. There was  
24 one of the three men did not touch her. That's what she told  
25 myself.

E4SUMCC2

"Maria Sosa"

1 Q. When you and the others were talking to her about if  
2 afterwards, after it allegedly happened, back at the parking  
3 lot, let's say, OK, in -- did you ask her about the fact that  
4 she was in disarray, that her pants were undone, that the belt  
5 was broken? Did you have any discussion with her about those  
6 facts?

7 A. When we were in the parking lot when we met up with her?

8 Q. Yeah.

9 A. We all asked her questions. We asked her what happened.  
10 She doesn't want to answer at that point. She was just crying.

11 Q. When you first asked her what happened, her first response  
12 was to cry?

13 A. Yes, she was in shock.

14 Q. She was in shock?

15 A. She was in shock. She was crying.

16 Q. Alright, could you --

17 Without anyone trying to minimize the trauma of the  
18 rape, could it have been, and you can you remember because you  
19 think back to when you spoke to her, it could have been she was  
20 crying because she was drunk or intoxicated?

21 A. No.

22 Q. By the way, have you been out with her on previous  
23 occasions?

24 A. Yes.

25 Q. Before this evening?

E4SUMCC2

"Maria Sosa"

1 A. Yes.

2 Q. OK.

3 And was getting drunk pretty much a part of the  
4 scenario?

5 A. In other occasions I have never seen her, no. Like, she  
6 would drink occasionally, socializing with all of the us, you  
7 know, all of the friends we have. We're all, yeah.

8 Q. I didn't mean to interrupt you, I'm sorry.

9 On other occasions have you seen her drunk or you have  
10 not seen her drunk?

11 A. She's -- I can't say that she's drunk because I usually  
12 don't, you know, go if I'm not the designated driver and I  
13 don't know what condition she might leave, you know, with  
14 another friend or something. But we've had, you know,  
15 acquaintances in a social place and we've all drank.

16 That day it was my responsibility not to drink because  
17 I was the designated driver. So I knew I was sober and I know  
18 what, you know, how everyone's condition was. In other social  
19 occasion, I wouldn't keep track of that because I was not  
20 responsible for anyone.

21 Q. Well, meaning that on other social occasions when you were  
22 not the designated driver that you might drink yourself?

23 A. Right.

24 Everyone's allowed to drink occasionally.

25 Q. I didn't say no.

E4SUMCC2

"Maria Sosa"

1 Now, did the police try to talk to her, if you know?

2 A. I don't know.

3 Q. Well, were there uniformed police officers in the garage,  
4 in the parking lot, at the time that you were there?

5 A. Yes.

6 Q. And, again, Biurny was there before you arrived --

7 A. Yes.

8 Q. -- to the parking lot, OK.

9 And when she was there, were the police there,  
10 uniformed officers there?

11 A. They were actually. Yes, they were.

12 Q. Approximately how many would you say they were?

13 A. Two.

14 Q. Two?

15 A. Yeah. From my memory, I think two, yes.

16 Q. Did they have a marked radio patrol car with them?

17 A. I'm sorry.

18 Q. OK.

19 Now, I don't mean to belabor this, I want to make sure  
20 that we have a clear answer there. You've seen Biurny out  
21 socially, occasionally, on other occasions?

22 When you first called 911, was that action that you  
23 took in response to something that made you call something that  
24 made you want to call?

25 A. I called 911 after I spoke to the male voice when we

E4SUMCC2

"Maria Sosa"

1 spoke -- when we dialed Mary's number, Biurny's number.

2 Q. Right.

3 And you spoke to the male?

4 A. The male right.

5 Q. The male who picked up the cell phone on their end?

6 A. Right.

7 Q. OK.

8 And you spoke to that individual?

9 A. Right.

10 Q. OK.

11 And what specifically, as far as you can remember, did  
12 he say to you?

13 A. We'll take her back there in five minutes.

14 We will return her in five minutes, We'll be there in  
15 five minutes are the answers he would give me.

16 Q. We will return in five minutes or we'll be there in five  
17 minutes?

18 Two different things.

19 A. We'll take her back in five minutes.

20 Q. Now, at that point did you ask: Take her back from where?  
21 Why is she gone in the first place?

22 Things like that?

23 Did you have any kind of conversation?

24 A. At that point I was actually arguing with that male on the  
25 phone asking him to bring her back, and that if not, I was

E4SUMCC2

"Maria Sosa"

1 going to call 911. Those are my exact words.

2 Q. All right.

3 And you gave him five minutes to bring her back?

4 A. Yeah. I would say five minutes.

5 Q. OK.

6 And did you wait the five minutes that you gave to  
7 bring her back? Did you wait the five minutes before you  
8 dialed 911?

9 A. No, I would say two seconds after I was hung up the phone  
10 with him I dialed 911.

11 Q. And approximately how soon after you called 911 did the  
12 police respond?

13 A. Can you repeat the question for me?

14 Q. Yeah.

15 Approximately how soon after you dialed 911 was it  
16 that the police responded?

17 A. I don't recall.

18 Q. Well, roughly? Minute? Two minutes? Five minutes? Ten  
19 minutes?

20 A. We were on the phone with the police. I don't know how  
21 long.

22 You're asking me when did they call back?

23 Q. Well, let me ask you --

24 They did not come at all?

25 A. No.

E4SUMCC2

"Maria Sosa"

1 Q. And the first time you saw any police presence in this  
2 whole situation was later on at the parking lot you -- after  
3 Mary was released standing there?

4 A. Right.

5 Q. And that's when they tried to take a statement from her and  
6 couldn't do it?

7 A. Right.

8 Q. I have no further questions."

9 MR. GARBER: Now this is the redirect of Ms. Strain.

10 THE COURT: So you are ADA Strain again?

11 MR. GARBER: Yes.

12 (Mr. Garber and Mr. Cohen reading)

13 "Q On cross-examination Mr. Veneziano asked you about prior  
14 occasions that you've been out with Biurny.

15 A. Yes.

16 Q. Has anything like this ever happened before?

17 A. No.

18 Q. Has she ever taken the car and driven off?

19 A. No.

20 Q. Has she ever disappeared?

21 A. No.

22 Q. Has she ever come back and said that men raped her?

23 A. No.

24 Q. No further questions."

25 MR. GARBER: This is now the recross by Mr. Veneziano.

E4SUMCC2

"Maria Sosa"

(Mr. Garber and Mr. Cohen reading)

"Q Has she ever gotten drunk

A. I answered that question before but there's OK. I have been on occasions with her and socializing, we've all been drinking. I don't know what in condition she has left that place to her home or wherever she's going, I wouldn't be able to answer that."

MR. GARBER: And that's the end of Maria Sosa's testimony at the criminal trial.

Now we are going to move on to Aurora Pujols' testimony, and I am now Shandra Strain doing the direct examination of Ms. Pujols.

THE COURT: So Mr. Cohen you are going to be Ms. Pujols.

MR. GARBER: It starts on page 108, line 12.

(Mr. Garber and Mr. Cohen reading)

"Q How old are you?

A. 29.

Q. And where do you live?

A. In New Jersey.

Q. How long have you lived in New Jersey?

A. All my life.

Q. Do you work?

A. Yes.

Q. What line of work do you do?

E4SUMCC2

"Aurora Pujols"

1 A. I work for the airlines.

2 Q. Are you also currently in school?

3 A. Yes, I am a full-time student, full-time nursing student.

4 Q. Do you live alone?

5 A. No, I live with my husband and my two children.

6 Q. How old are your children?

7 A. Nine and four.

8 Q. Do you know a woman by the name of Biurny Peguero?

9 A. Yes, I do.

10 Q. Do you refer to her by another name?

11 A. Yes, I refer to her as Mari.

12 Q. How long have you known her?

13 A. For about eight years.

14 Q. How would you classify your friendship with her?

15 A. We're like sisters.

16 Q. How often to you currently see her?

17 A. Maybe twice, three times a week.

18 Q. Prior to September 18, 2005, how often did you see her  
19 then?

20 A. A lot more. We used to go a lot on the weekends.

21 Q. I'd like to direct your attention to September 17, 2005,  
22 that night, going into the early morning of September 18, 2005.

23 Do you remember that night?

24 A. Yes, I do.

25 Q. Who were you with on that night?

E4SUMCC2

"Aurora Pujols"

1 A. I was with Mari, with Maria and with a cousin of mines  
2 named Heliana.

3 Q. Do you still talk to Heliana?

4 A. No.

5 Q. Do you know where she's currently residing?

6 A. No. The last time I heard, she was somewhere in New  
7 Hampshire.

8 Q. And did there come a time that night when you met up with  
9 someone else?

10 A. Yes. We met up with a mutual friend of ours, whose name is  
11 Orlando.

12 Q. When was the last time that you talked to Orlando?

13 A. The last time we came for when we saw the grand jurors.

14 Q. Where did you guys go that night?

15 A. We went to a club called Umbrella.

16 Q. Is that here in the County of New York?

17 A. Yes, it is.

18 Q. Do you know the general area of where it's located?

19 A. I know it's off Dyckman, but I don't know exactly.

20 Q. How did you guys get there that night?

21 A. We drove there.

22 Q. OK.

23 Who drove?

24 A. I did.

25 Q. In whose car was it?

E4SUMCC2

"Aurora Pujols"

1 A. My car.

2 Q. Who did you take to the lounge?

3 A. Myself, Maria and Heliana and Mari.

4 Q. I'm showing you what's previously been entered into  
5 evidence as People's 1.

6 Do you recognize that?

7 A. Yes.

8 Q. What is that a picture of?

9 A. That's a picture of us at the club.

10 Q. And does that picture fairly depict the way you guys looked  
11 that night?

12 A. Yes, it does.

13 Q. You mentioned that you have two children.

14 Who was taking care of them while you guys were at the  
15 club?

16 A. Their daddy.

17 Q. Approximately what time did you arrive at that club that  
18 night?

19 A. Probably around midnight.

20 Q. And how long did you stay there?

21 A. Until it closed, till about 4, 4:15.

22 Q. And were you drinking that night?

23 A. Yes, we were.

24 Q. What you were drinking?

25 A. We were drinking Blue Hawaiians.

E4SUMCC2

"Aurora Pujols"

1 Q. Do you know what's in that?

2 A. I know that it has Hypnotiq, but other than that...

3 Q. Do you know what Hypnotiq is?

4 A. It's like -- it's like a liquor, like a blue -- like a  
5 fruity liquor.

6 Q. Do you know how many drinks you had that night?

7 A. Probably about four or five.

8 Q. Did you know if Biurny was drinking?

9 A. Yes.

10 Q. Do you know what she was drinking?

11 A. We were all drinking the same thing.

12 Q. How would you classify yourself when you left the club that  
13 night?

14 A. I was drunk.

15 Q. And what about Biurny?

16 A. The same.

17 Q. How about Maria?

18 A. No. Maria was the only one that was sober. She was the  
19 designated driver.

20 Q. Did you have anything to drink before you arrived at the  
21 club that night?

22 A. No.

23 Q. What about after you left?

24 A. No.

25 Q. What happened when you left the club? Where did you guys

E4SUMCC2

"Aurora Pujols"

1 go?

2 A. We went to a restaurant on the corner of Dyckman and  
3 Broadway. We went to eat.

4 Q. Who drove you there?

5 A. Maria drove.

6 Q. Where was the car parked, and what happened when you guys  
7 arrived at that location?

8 A. We parked in front of the restaurant, like right in front  
9 of it at a bus stop. I stayed in the backseat because I didn't  
10 feel real good, and everybody else got out of the car to go use  
11 the bathroom and to get something to eat.

12 Q. Did there come a time whether Biurny was with you in the  
13 backseat of the car?

14 A. Yes. After she used the bathroom, she came back outside  
15 and sat with me inside the car in the backseat.

16 Q. Did you have an opportunity to view her at that point and  
17 see what she looked like?

18 A. Yes, I did.

19 Q. Was she wearing --

20 Do you recall what she was wearing that night?

21 A. She was wearing dress pants and a tube top.

22 Q. Do you notice if she had any accessories or belt?

23 A. She a belt on and earrings, you know, bracelets.

24 Q. And when she came out of the bathroom, did she still have  
25 all of those things on?

E4SUMCC2

"Aurora Pujols"

1 A. Yes, she did.

2 Q. Where were you seated in the car in front of the  
3 restaurant?

4 A. I was seated in the backseat on the passenger's side.

5 Q. And where was Biurny?

6 A. Sitting next to me behind the driver's side.

7 Q. Do you know where the keys to the car were at that time?

8 A. They were in the ignition.

9 Q. Was the car parked legally?

10 A. No, it was parked in front of a bus stop.

11 Q. Do you know if the doors were locked or unlocked?

12 A. They weren't locked.

13 Q. Were not locked?

14 A. No.

15 Q. What about the windows, were they up or down?

16 A. The windows were all up.

17 Q. Can you describe for us what happened while you and Biurny  
18 were in the backseat of the car?

19 A. There was a -- I happened to look over and I saw a  
20 gentleman approaching the vehicle, but I really didn't pay any  
21 attention. I didn't think that he was coming to the car. Then  
22 he opened the car and came inside the car.

23 And of course I said, you know: What are you doing in  
24 my car, who are you, get out of my car. He said: No, no,  
25 wait. I just want to talk to you guys, I just want to talk to

E4SUMCC2

"Aurora Pujols"

1 you guys. I'm saying: Look, get out of my car, there is  
2 nothing to talk about, get out of the car.

3 So he kept on insisting that he wanted to talk to us.  
4 And at that moment, Mari got up and she said: I'm going to  
5 move the car. I said: No, Mari, what are you going to move  
6 the car for? She said: I'm just going to move the car. I  
7 said: No, no, don't move the car, just stay here.

8 I said to the man: You need to get out of my car.  
9 She was like: Wait, wait, wait, let me move the car.

10 She climbs over the center of the two seats and gets  
11 in the driver side to move the car. I'm like: Mari, don't  
12 move the car, wait, he needs to get out. So we're bickering  
13 back and forth. She is insisting she's going to move the car.

14 So I got upset, I said, you know: Do whatever you  
15 want. And I got out of the car. I walked into the restaurant  
16 to let everyone else know she was in the car and there was a  
17 guy in the car. By the time we came back out, the car was no  
18 longer there.

19 Q. I will back up for a moment, OK?

20 The guy car you saw get into the car, do you know --  
21 what would you consider his race?

22 A. I thought he was Hispanic.

23 Q. And what kind of --

24 What was his skin color?

25 A. He was white.

E4SUMCC2

"Aurora Pujols"

1 Q. So you thought it was a white Hispanic?

2 A. Mm hmm.

3 Q. What made you think that?

4 A. Because of his appearance, because of his attire, what he  
5 was wearing.

6 Q. Was there anything else that made you think he was  
7 Hispanic?

8 A. Just his mannerisms, the way that he spoke, you know, the  
9 slang he used.

10 Q. But you would classify his skin color --

11 A. As white, ye, a white Hispanic. That's what I assumed he  
12 was.

13 Q. Did you see anyone else when you got into the car?

14 A. No, I did not.

15 Q. Did you ever go in the restaurant and tell them that there  
16 was more than one guy?

17 A. No, I did not.

18 Q. Did you later, at the end of the evening, learn that there  
19 were -- that there was more than one guy?

20 A. Yes, I did.

21 Q. But at that point in which when you went into the  
22 restaurant, how many men had you seen?

23 A. One.

24 Q. When he got into the car, which side did he get into?

25 A. He got in on the passenger's side of the car.

E4SUMCC2

"Aurora Pujols"

1 Q. Did you ever ask him to get into the car?

2 A. No, I did not.

3 Q. What about Biurny?

4 A. No, she did not.

5 Q. When he was talking to you in the car, how was his body  
6 positioned in the seat?

7 A. Can I show you?

8 Q. Go ahead.

9 A. Like this.

10 Q. OK, so you're --

11 A. He's sitting, I'm sitting behind him, so I'm seeing his  
12 profile.

13 Q. OK.

14 Who was he facing?

15 A. He was facing Biurny.

16 Q. What was Biurny saying when he got into the car?

17 A. She was not really speaking. It was mostly me telling him  
18 to get out of the car. Most of the time when we spoke, it was  
19 just him and me. He kept saying: Wait, wait, wait, let me  
20 talk to you guys. I said: There's nothing to talk about, just  
21 get out of my car.

22 Q. What emotions were you feeling when you got into the car?

23 A. I was nervous.

24 Q. But you decided to get out?

25 A. Yes, I did.

E4SUMCC2

"Aurora Pujols"

1 Q. For what reason?

2 A. I was scared. I just got out of the car. I was upset that  
3 I was bickering, telling her not to move the car, then he's in  
4 my car, I don't know who he is. And maybe I was under the  
5 influence of alcohol, I didn't think to wait. My reaction was  
6 to get out of the car.

7 Q. When you got out of the car, did Biurny stay in the car?

8 A. She did.

9 Q. Did you know this man?

10 A. No, I did not.

11 Q. Had you everywhere seen him before?

12 A. No, I had not.

13 Q. Did you ask him to get into the car?

14 A. No, I didn't.

15 Q. Did you ever agree to go anywhere with this man?

16 A. No.

17 Q. Did you ever go anywhere with this him?

18 A. No.

19 Q. I'm going to show you what's previously been entered into  
20 evidence as People's 3.

21 Can you show us in this picture where the car was  
22 parked?

23 A. It was parked right in front where the bus stop is.

24 Here.

25 Q. So right there in the middle of the photograph?

E4SUMCC2

"Aurora Pujols"

1 A. Yes.

2 Q. When you got out of the car, did you look back?

3 A. No, I was just walked straight in the restaurant to tell  
4 the rest of them to come out, that it was time for us to leave.

5 Q. Is it fair to say when you got out of the car you were  
6 angry?

7 A. Yes, I was.

8 Q. Who were you angry at?

9 A. Just at the situation.

10 Q. Why?

11 A. Because I wanted to leave, and then he was in the car and  
12 then I ended up bickering with her. It was just -- I guess it  
13 was the moment. I was just upset.

14 Q. Who was in the restaurant when you went in?

15 A. Orlando, Maria and Heliana.

16 Q. And what happened when you went into the restaurant?

17 A. I explained to them what had happened, that she was still  
18 outside. I had to use the bathroom. I went in to use the  
19 bathroom. I -- I can't actually recall if it was Maria or  
20 Heliana that went in with me to the bathroom. I remember  
21 vomiting. By the time I came out of the bathroom, they were  
22 already outside.

23 Q. And when you came outside, where was the car?

24 A. It was gone.

25 Q. Did you ever see the car pull away?

E4SUMCC2

"Aurora Pujols"

1 A. No, I didn't.

2 Q. Did you ever see any other men in the car at that time?

3 A. No, I didn't.

4 Q. Approximately how long were you have inside the restaurant?

5 A. Probably for 10 or 15 minutes.

6 Q. After you got out of the car and you went into the  
7 restaurant, approximately how long were you in the restaurant?

8 A. Probably about 10 minutes, 10, 15 minutes.

9 Q. And what happened when you came back out?

10 A. The car was gone.

11 Q. What did you guys do next?

12 A. Maria was asking, you know, where the car was and I had  
13 already explained to her what had happened. So Heliana called  
14 her, called Mari, and she kept saying she would be back in five  
15 minutes.

16 Five minutes kept passing and she wasn't coming back.  
17 So Heliana kept calling. And then at one point when she called  
18 she could hear her crying, and talking and crying, and  
19 Heliana's asking her: What's wrong. And she's saying: Please  
20 just come get me, please just come get me.

21 Q. And did you see Maria also calling Biurny?

22 A. Yes.

23 Q. And who else was still with you at that time?

24 A. Orlando was with us also.

25 Q. And was he also making phone calls?

E4SUMCC2

"Aurora Pujols"

1 A. They were using his phone and he was talking, but it was  
2 Maria and Heliana dialing the number.

3 Q. OK.

4 Were they using anyone else's phone?

5 A. No.

6 Q. Just Orlando's?

7 A. Orlando's and Maria's.

8 Q. Maria's phone?

9 A. I think it was either Maria's or maybe Heliana's phone.

10 Q. Did you have a cell phone with you?

11 A. Not on me. I didn't. It was in my car.

12 Q. Did you guys call the police immediately?

13 A. Probably about after five minutes of standing out there  
14 seeing she wasn't coming, Heliana called 911.

15 Q. OK.

16 When you came out of the restaurant, where did think  
17 Biurny was?

18 A. I thought she went to park the car.

19 Q. Did there come a point when you all went to look for  
20 Biurny?

21 A. No. We called 911. We walked to the corner. You, how  
22 there's the corner to look. As a matter of fact, it was  
23 Heliana that walked to the corner and didn't see the car. They  
24 called 911. We were just waiting hoping that she would come  
25 back.

E4SUMCC2

"Aurora Pujols"

1 And they kept speaking to the other guy. He kept  
2 saying: I'm going to bring her back, I'm going to bring her  
3 back, I'm going to bring her back, just don't call the police,  
4 just don't call the police. But she wasn't coming back.

5 Q. So then what happened?

6 A. We called 911.

7 Q. What happened after you called 911?

8 A. Then he called and we called -- yeah we called the cab to  
9 try to look for her.

10 Q. A cab?

11 A. Yeah, one of those livery things.

12 Q. OK.

13 A. Those ones that drive by.

14 And we were looking for her. I know Orlando was on  
15 the phone and they were explaining to where, you know, where  
16 she was, where we could find her. I remember going over a  
17 bridge and then we made an immediate U-turn. They told him she  
18 was in a parking lot and that's where we found her, in the  
19 parking lot.

20 Q. Was Maria also on the phone at that time while you were in  
21 the cab?

22 A. Yes, she was.

23 Q. Where did you go after you made that U-turn?

24 A. We went to a parking lot.

25 Q. And what did you observe when you arrived at the parking

E4SUMCC2

"Aurora Pujols"

1 lot?

2 A. My car was there and Mari was inside the backseat of the  
3 car.

4 Q. Were there any men there at that time?

5 A. No.

6 Q. Were there any parking lot attendants there?

7 A. The attendants were there.

8 Q. Did there come a time that police officers arrived.

9 A. Yes, there did.

10 Q. OK.

11 What happened when you approached Biurny?

12 A. She was crying hysterical and she was very -- she was just  
13 like -- how could I explain to you -- she was just hysterical,  
14 she was just destroying crying not even reacting, just not  
15 herself.

16 Q. Did you see whether or not she spoke to the police  
17 officers?

18 A. I don't remember.

19 Q. Did you notice anything about her when you approached her  
20 and saw her in the car?

21 A. Her pants were opened and her belt was broken.

22 Q. What did her face appear like to you?

23 A. As if she had been crying. Her mascara were all spread.  
24 Her face was very flustered, very red. Her hair was all messed  
25 up.

E4SUMCC2

"Aurora Pujols"

1 Q. Approximately how long was Mary missing?

2 A. About an hour and a half maybe.

3 Q. When you saw her that night at the club and in your car at  
4 the restaurant before she was missing, did you have an  
5 opportunity to see her body, to see her arms?

6 A. Yes.

7 Q. Do you know if she had any injuries?

8 A. She didn't.

9 Q. At that point in which you were inside the car before she  
10 disappeared.

11 A. She had no injuries.

12 Q. Was her belt broken at that time?

13 A. No.

14 Q. Did there come a point when Biurny told all of you that she  
15 had been raped?

16 A. Yes.

17 Q. When did that occur?

18 A. When we were all in the car.

19 Q. Did she tell you who had raped her?

20 A. The guy who had gone in the car and drove off with her.

21 Q. OK.

22 And did she tell you when that had occurred?

23 A. She said that they moved her from one car to another car.

24 So she was raped in a different car, not in my -- not in my  
25 vehicle.

E4SUMCC2

"Aurora Pujols"

1 Q. Did you --

2 Did she tell you whether or not more than one  
3 individual had raped her?

4 A. Yes.

5 Q. Did she tell you how many?

6 A. She said it was a total of three.

7 Q. When you were in the car and she told you that she had been  
8 raped, what did you guys do next? Where did you go?

9 A. We came back to Jersey, we took her straight to the  
10 hospital.

11 Q. At the hospital, did there come a point when you saw  
12 whether or not she had had any injuries?

13 A. Yes.

14 Q. What were those injuries?

15 A. She had bruises on her arms and on her shoulder.

16 Q. I'm showing you what's previously been entered into  
17 evidence as People's 6 through 15.

18 Could you take a look at those for me, please, and let  
19 me know when you're done looking at them.

20 A. I'm finished.

21 Q. What do those pictures depict?

22 A. The bruises that she had on her arms and on her shoulders,  
23 of her arm.

24 Q. Did she have any of those injuries the last time you saw  
25 her before she was missing?

E4SUMCC2

"Aurora Pujols"

1 A. No, she didn't.

2 Q. After the hospital, did you return with Biurny to New York  
3 City and meet with detectives?

4 A. Yes, we did.

5 Q. What did you guys do at that time?

6 A. We had to give our statements of what had happened.

7 Q. Did you also drive around with the detective?

8 A. Yes, we did.

9 Q. Was that Detective Arbuiso?

10 A. Yes, it was.

11 Q. You stated earlier that you had a cell phone that night but  
12 it wasn't with you when you were calling Biurny.

13 A. No, I had left my cell phone in my pocketbook in the car.

14 Q. When you returned to your car, was that cell phone still  
15 there?

16 A. No, it was missing.

17 Q. Aurora since this incident, how have things changed between  
18 you and Biurny?

19 A. A lot. We're not as close as we used to be. It's caused  
20 like -- I feel guilty, you know. It's put a big strain on our  
21 friendship. We have children who are days apart. They are not  
22 as close as they used to be because it's hard to look at her.  
23 I feel like a lot of guilt because of what happened. I feel if  
24 I hadn't been drinking --

25 Q. I have no further questions."

E4SUMCC2

"Aurora Pujols"

1 MR. GARBER: Now it is the cross-examination of Ronald  
2 Veneziano.

3 (Mr. Garber and Mr. Cohen reading)

4 "Q How do you pronounce your last name?

5 A. Pujols.

6 Q. Sorry?

7 A. Pujols. The J is silent.

8 Q. Pujols?

9 Can I just call you Aurora, that will be easier?

10 A. That's fine.

11 Q. OK.

12 A. Mm hmm.

13 Q. That evening you said that you had been drinking for the  
14 full amount of time and that everyone was in the Umbrella,  
15 correct?

16 A. When we got there, yes, we started drinking.

17 Q. And you calculate that you had four, five, six drinks? How  
18 many drinks would you say?

19 A. Four to five.

20 Q. And that was enough to make you intoxicated?

21 A. Yes, it was.

22 Q. During the time when you were drinking, were you eating  
23 anything?

24 A. Munching on chips.

25 Q. That's all?

E4SUMCC2

"Aurora Pujols"

1 A. Mm hmm.

2 Q. OK.

3 And there came a time when you left and you frankly  
4 admit that you were drunk?

5 A. I was drunk, yes.

6 Q. Is that correct?

7 A. Yes.

8 Q. OK.

9 And the only one who was sober was Maria Sosa?

10 A. Correct.

11 Q. Because she was the designated driver, correct?

12 A. Correct.

13 Q. Now, there came a time when you were sitting in the  
14 backseat of your car when this individual came into the car?

15 A. Yes.

16 Q. OK?

17 You had never he seen him before?

18 A. No, I had not.

19 Q. And you had never spoken to him before?

20 A. No, I had not.

21 Q. OK.

22 And he was, on that evening, for all accounts and  
23 purposes, a total stranger who you were seeing for the first  
24 time?

25 A. Yes.

E4SUMCC2

"Aurora Pujols"

1 Q. OK.

2 So he comes into the car and he sits -- he's seated in  
3 the front seat, correct?

4 A. Yes.

5 Q. OK.

6 And you're in the backseat of the car?

7 A. Yes.

8 Q. Correct?

9 And at this time were you aware that there was some  
10 problem with Biurny, that she wasn't around or something  
11 happened to her or she left and did something?

12 A. I don't understand.

13 Q. OK.

14 At the time this individual came into the car, were  
15 you aware that something had happened to Biurny?

16 A. Nothing had happened to her. She was sitting next to me.

17 Q. Sorry. She's sitting next to you, right.

18 Now, you're having some kind of dialogue and  
19 discussion with this individual, yes?

20 A. Yes.

21 Q. OK. He wants --

22 He wants to take you somewhere or talk to you, and you  
23 say: No, I don't want to do any of that, words to that effect:  
24 Just get out of my car?

25 A. He never spoke of taking us anywhere. He said: I want to

E4SUMCC2

"Aurora Pujols"

1 speak to you, let me talk to you.

2 Q. OK.

3 He didn't suggest going anywhere?

4 A. No, he did not.

5 Q. Did he suggest to you what it was that he wanted to talk to  
6 you about?

7 A. I never gave him the opportunity. I kept saying: I don't  
8 want to talk to you, just get out of my car.

9 Q. OK.

10 Now, what was -- to the extent that you can bring it  
11 back and recollect it as a thought in your mind, what was the  
12 total amount of time that you would say you were in the car, he  
13 was in the front, and that you were having this dialogue where  
14 he wanted to talk to you and you kept telling him just get out  
15 of the car? How long?

16 A. Five to ten minutes we were bickering back and forth.

17 Q. Five to ten minutes?

18 A. Yes.

19 Q. Bickering back and forth for five to ten minutes?

20 A. Mm hmm.

21 Q. All right.

22 So during that time that he was in the front of the  
23 car and you were in the back of the car, I assume as you were  
24 talking to him you were looking at him?

25 A. He was never looking directly at me. He was always looking

E4SUMCC2

"Aurora Pujols"

1 at Biurny. Speaking to Biurny. And I was the one that kept  
2 saying: Just get out of the car, just get out of the car, just  
3 get out of the car.

4 Q. OK.

5 But he was in car. The fact that he was in the car  
6 and you were in the car and you were looking at him for at  
7 least, say, ten minutes?

8 A. Yes.

9 Q. While this one sided conversation was going on?

10 A. Yes.

11 Q. Correct?

12 And then there reaches a point where you start to  
13 think about it and you say to yourself: I don't like this  
14 situation, I'm going to get out of here, and then what did you  
15 do, just open the door and leave?

16 A. I opened the door and got out of the car.

17 Q. OK.

18 Because you were concerned about what would happen or  
19 could happen?

20 A. Yes.

21 Q. OK.

22 Now, you say that during that time the person that you  
23 were speaking to in the front of the car was looking to the  
24 side straight ahead or was positioned in such a way that you  
25 got a profile of him, you were able to see his profile?

E4SUMCC2

"Aurora Pujols"

1 A. I was able to see his profile.

2 He was also wearing a hat.

3 Q. He was wearing a hat?

4 A. Yes.

5 Q. What kind of hat was he wearing?

6 A. Like a baseball cap type of hat.

7 Q. A baseball cap hat?

8 A. It was one like a baseball hat, specifically like the hats  
9 that don't have anything.

10 Q. Right. He was wearing one of things?

11 A. A hat, yes, he was wearing a hat.

12 Q. OK.

13 After you had told him to get out and he wouldn't get  
14 out and you got out, how much time would you say elapsed  
15 between the time that you got out of the car and when the  
16 police was first called by Ms. Sosa I think it was?

17 A. Exact time, I wouldn't be able to tell you.

18 Q. OK.

19 A. I went into the restaurant, I told them. So the exact time  
20 I wouldn't be able.

21 Q. OK.

22 Now I've asked you some questions and I want to ask  
23 you just a few more and I ask you to forgive me if they sound  
24 somewhat embarrass --

25 You say you have a husband and two children?

E4SUMCC2

"Aurora Pujols"

1 A. Yes, I do.

2 Q. How old are the two children?

3 A. Nine and four.

4 Q. On this particular evening when were you out --

5 A. Yes.

6 Q. -- you say that the two children were with their father?

7 A. Which is my husband.

8 Q. Which is your husband?

9 A. Yes.

10 Q. So you're not estranged or divorced -- you're husband and  
11 wife?

12 A. Yes.

13 Q. And you were out with three or four other people?

14 A. Females.

15 Q. OK.

16 Drinking rather heavily that evening?

17 A. Yes.

18 Q. OK?

19 You mentioned very forthrightly that you had been  
20 drinking, and I believe the answer you gave to one question in  
21 response to Ms. Strain's question was you said specifically I  
22 was drunk, right?

23 A. Yes, I was.

24 Q. OK. I know that you were but you said that you were.

25 Assuming that none of this ever happened, you would

E4SUMCC2

"Aurora Pujols"

1 just be taken back home, is that correct? The designated  
2 driver would drop off all the other people who were in the car  
3 one of which was you?

4 Yes?

5 A. Meaning if I would have been drinking?

6 Q. No. Was that the plan?

7 A. Meaning if I would have been drinking.

8 Q. No. Was the plan that evening for you to drive home by the  
9 designated driver?

10 A. No. Usually when we got out on the weekends after we would  
11 leave the club, we usually go to eat. That's like part of it.

12 Q. But it would --

13 Had all of this thing not happened on that evening,  
14 you say that you would have just left the restaurant and then  
15 go --

16 A. After the restaurant we would have went home.

17 Q. And would have just gone home.

18 Given the fact that drunkenness was part of the  
19 scenario or, to put it a different way, drinking sufficient  
20 alcohol content to become drunk, how would you -- how would you  
21 plan to get home? Who would take you home?

22 A. I was able to walk. I wasn't tripping over my feet and I  
23 wasn't out with strangers, I was out with family members.

24 These are not just strangers. They're family members.

25 Worst case scenario: If I was really, really bad that

E4SUMCC2

"Aurora Pujols"

1 I couldn't walk, they would have escorted me upstairs to my  
2 house. They're not -- these are my friends from years.  
3 Actually two of them are related to me.

4 Q. So these are just not friends, this is more than friends,  
5 this is family?

6 A. Yeah, they're not random friends.

7 Q. Basically I think that the question I want to ask you is:  
8 You would have -- you would have been brought to your home or  
9 gone to your home back to your children, especially your two  
10 younger children.

11 A. That were sleeping.

12 Q. You would have gone to your home to your family drunk?

13 A. Yeah.

14 Q. Right?

15 A. And my husband would have been fine with that.

16 Q. And your husband would be fine with that?

17 A. Yeah, he. Would help me, yeah.

18 Q. Would your children also be fine with that?

19 A. My children would have been sleeping when I got home.

20 Q. Now, again, I want you to think about to the conversation  
21 that you were having when you were in the backseat of your car  
22 and this man got into the front, OK?

23           Given the amount of time you spent with him, whether  
24 you were looking right at him, whether willing or unwilling,  
25 you were talked with him, you --

E4SUMCC2

"Aurora Pujols"

1 The question is, I'd like you to look at this man.

2 Take a look at him.

3 Is this the person that was in the car that night or  
4 not?

5 A. Yes, it was.

6 Q. You're positive of that?

7 A. Yes.

8 Q. What makes you positive?

9 A. Because I know. I know that that's him. I remember him.

10 I may not have remembered him the day of the lineup. I may not  
11 have picked him out of the lineup. I was nervous. We had just  
12 been through an extreme ordeal, but that's him.

13 Q. That's him?

14 A. Yes, it is.

15 Q. But that's --

16 That's not what you told the police when the police  
17 arranged the lineup?

18 A. I just told you that.

19 Q. Isn't that right?

20 A. Yeah.

21 Q. So when you went to the lineup and the defendant was in the  
22 lineup?

23 A. Yes, he was.

24 Q. Wasn't he?

25 A. Yes.

E4SUMCC2

"Aurora Pujols"

1 Q. And there were five other people who were in the lineup,  
2 correct?

3 A. Yes.

4 Q. And you were asked to see if you could pick out the one  
5 individual that they were interested in, Mr. McCaffrey, right?

6 A. Yes.

7 Q. Do you remember how long you looked at that lineup before  
8 you told them what you told them?

9 A. No, I don't remember.

10 Q. Was it a matter of seconds or a minute?

11 A. I don't remember.

12 Q. You don't remember?

13 A. No.

14 Q. Isn't it a fact, to cut right to the chase of it, right to  
15 the heart of it, that you told the police officers: I don't  
16 see him, he's not in the lineup, and in addition to that, you  
17 picked out a filler?

18 Isn't that right?

19 Do you know --

20 on the night that you had the lineup, did any of the  
21 police officers tell you what the word 'filler' meant?

22 A. No.

23 Q. They didn't tell you they are another person --

24 Do you know what a filler means?

25 A. Now that you're telling me.

E4SUMCC2

"Aurora Pujols"

1 Q. It's someone else who stands in the lineup but where they  
2 know he is not guilty of anything?

3 A. OK.

4 Q. Just to make a lineup, OK?

5 A. OK.

6 Q. So you had that here, you had Mr. McCaffrey in the lineup  
7 and you had the rest of the fillers --

8 In that lineup, did you pick out the defendant?

9 A. According to the Detective Arbuiso, I did not.

10 Q. In that lineup, did you pick out someone who you said was  
11 the rapist where it turned out that that person was a filler,  
12 probably a police officer?

13 A. I never knew anything about a filler. They didn't even  
14 tell me that I picked the wrong person. I didn't find out that  
15 I picked the wrong person until way later. It's not like they  
16 told me that day.

17 Q. No one told you that day?

18 A. No, they didn't.

19 Q. How much time would you estimate went by --

20 How much time would you say went by between the night  
21 where you made the misidentification and picked out the filler  
22 and the time that the police told you what happened that night  
23 and the mistake that you had supposedly -- the mistake you had  
24 made?

25 Did there come a time when someone told you that you

E4SUMCC2

"Aurora Pujols"

1 had picked out -- made what they consider to be a  
2 misidentification and an incorrect selection of a filler?

3 A. There did come a time. Exactly when it was, I don't  
4 remember.

5 Q. I have no further questions."

6 MR. GARBER: This is redirect by Shandra Strain.

7 (Mr. Garber and Mr. Cohen reading)

8 "Q As you sit here today, how sure are you that the defendant  
9 is the man who got into the car?

10 A. A hundred percent.

11 Q. When you were out that night -- actually, strike that.

12 How often prior to that, to September 18, 2005, would  
13 you go out at night?

14 A. We go out not every weekend. At least twice during the  
15 weekend or sometimes we got, go out to eat, you know, during  
16 the week.

17 Q. When was the last time since then have that you've been  
18 out?

19 A. That day, together, that day.

20 Q. No further questions."

21 MR. GARBER: Recross-examination by Mr. Veneziano.

22 (Mr. Garber and Mr. Cohen reading)

23 "Q You are a hundred percent sure that Mr. McCaffrey is the  
24 one who committed the rape?

25 And that Mr. McCaffrey was the one in the car,

E4SUMCC2

"Aurora Pujols"

1 correct?

2 A. Yes.

3 Q. You are a hundred percent certain?

4 A. Yes.

5 Q. And when did you first communicate this strong total on  
6 hundred percent certainty to Ms. Strain?

7 A. Ms. Train and I have not spoken specifically about him.  
8 This is -- we never spoke about that.

9 Q. So are you saying that --

10 A. You're going to have -- you are going to have to ask your  
11 questions a little more clearly so I can understand what you  
12 are asking.

13 Q. Are you saying, are you saying, that the first time since  
14 that evening of the lineup that you were a hundred percent  
15 certain it was him was when?

16 A. That I'm telling you, I'm telling you now.

17 Q. That you are telling me now?

18 A. I'm telling you now.

19 Q. All right.

20 And that's the first time that you communicated that  
21 you were a hundred percent certain to anybody?

22 A. From this, yes, from this here, mm hmm.

23 Q. OK. OK.

24 Now, how many times would you say that you've spoken  
25 to Ms. Strain as a result of your participating as a witness in

E4SUMCC2

"Aurora Pujols"

1 this case?

2 A. With this time?

3 Q. Yes.

4 A. This would be about the third time.

5 Q. Third time.

6 And during those three times, had you reached your  
7 level of one hundred percent certainty about the defendant?

8 Do you know?

9 A. Yes.

10 Q. OK.

11 When was the first time you conveyed to Ms. Strain  
12 that you were absolutely positive that it was William McCaffrey  
13 in the car with you?

14 A. That conversation never came up between her and I.

15 I don't know what you're trying to ask.

16 Q. Well, if you were a hundred percent certain, why did you  
17 not tell that to Ms. Strain?

18 Why didn't you communicate that certainty?

19 A. Because we never spoke about it. Obviously if I'm coming  
20 to trial and I'm testifying, it's because I am positive that it  
21 was him. I wouldn't sit here and accused somebody that didn't  
22 do something.

23 Q. Well, isn't that --

24 Isn't that exactly what you did on the night of the  
25 lineup, isn't that right?

E4SUMCC2

"Aurora Pujols"

1           When you picked out the filler, you believed that the  
2 filler was the individual?

3       A.   No.

4           If you go back, you can probably ask them what I said.  
5 I said I'm not sure. I was nervous. She had been through a  
6 traumatic experience. And yeah, I was nervous. It might have  
7 made a mistake, but I'm sure.

8       Q.   Now you are sure?

9       A.   I'm positive, yes.

10      Q.   No further questions."

11           MR. GARBER: Redirect by Ms. Strain on 151.

12           (Mr. Garber and Mr. Cohen reading)

13      "Q Since the lineup, have you ever seen this man and asked to  
14 identify himself since then?

15      A.   No.

16      Q.   Was today the first time that you are asked to identify  
17 him?

18      A.   Yes.

19      Q.   By the defense attorney?

20      A.   Yes.

21      Q.   Thank you.

22           No further questions."

23           MR. GARBER: Now this is going to be brief. This is  
24 page 158, and it is lines 7 to 19.

25           And your Honor, this is Susan Johnson who is a

E4SUMCC2

"Aurora Pujols"

1 T-Mobile, a cell phone representative.

2 THE COURT: All right.

3 MR. GARBER: So I am going to be Ms. Strain for this  
4 series of questions and answers.

5 THE COURT: Again, Ms. Strain is the Assistant  
6 District Attorney in Manhattan. She is the prosecutor.

7 MR. GARBER: Page 158, starting on line 7.

8 (Mr. Garber and Mr. Cohen reading)

9 "Q If a phone call is made and the person answers but  
10 immediately hangs up, how is that billed?

11 A. It would be billed at one minute.

12 Q. Looking at People's 29, when do these phone calls begin?

13 A. September 18, 2005.

14 Q. At approximately what time?

15 A. 5:14 a.m.

16 Q. When do these calls end?

17 A. September 18, 2005 at 6:08 a.m.

18 Q. And the telephone number again associated with these  
19 records?

20 A. 551-358-0988.

21 Q. I have no further questions."

22 MR. GARBER: And that is it for Susan Johnson.

23 I believe at this juncture, I think that the  
24 defendants' counsel is going to handle that part.

25 THE COURT: Handle what part?

E4SUMCC2

"Biurny Peguero"

1 MR. GARBER: A different witness, Biurny Peguero, her  
2 testimony.

3 THE COURT: 15 minutes. We want to use this time, so  
4 let's go.

5 MR. COHEN: I have a different binder.

6 THE COURT: All of the trial testimony will be  
7 Plaintiff's 70.

8 MR. COHEN: It is in here, it is up to you. I will  
9 just leave it.

10 MR. LARKIN: This is the complete direct examination  
11 of Biurny Peguero who is the complaining witness in this case.

12 I will be Ms. Strain and Ms. Zgodny, my co-counsel,  
13 will be the witness.

14 THE COURT: So you are the Assistant District  
15 Attorney, Ms. Strain, and you are Ms. Peguero.

16 MS. ZGODNY: Yes, your Honor.

17 THE COURT: Everybody got that?

18 All right, let's proceed.

19 (Mr. Larkin and Ms. Zgodny reading)

20 "Q Good morning, Biurny.

21 Do you go by any other names?

22 A. Yes.

23 Q. What do people call you?

24 A. Mari.

25 Q. Who calls you Mari?

E4SUMCC2

"Biurny Peguero"

1 A. My friends and family.

2 Q. Where are you from?

3 A. Dominican Republic.

4 Q. And how long have you been in the United States?

5 A. Like eight years.

6 Q. Eight years?

7 A. Seven years, I could be.

8 Q. How old are you?

9 A. 23.

10 Q. Where do you live?

11 A. New Jersey.

12 Q. Who did you live with?

13 A. My son.

14 Q. How old i your son?

15 A. Four.

16 Q. How long have you lived in New Jersey?

17 A. Four, five, six years.

18 Q. Where did you live before that?

19 A. New York.

20 Q. What is your current marital status?

21 A. I'm married. I'm separated.

22 Q. Where does your husband live?

23 A. New Jersey.

24 Q. When did you get separated?

25 A. Like around three years ago.

E4SUMCC2

"Biurny Peguero"

1 Q. How long were you married?

2 A. Five years.

3 Q. Who has custody of your son?

4 A. I do.

5 Q. Are you a legal citizen of the United States?

6 A. No.

7 Q. Why not?

8 A. I don't have papers.

9 Q. Are you currently in the process of getting your  
10 citizenship?

11 A. Yes.

12 Q. Where was your son born?

13 A. New Jersey.

14 Q. Biurny, how tall are you, approximately?

15 A. Five-two.

16 Q. And approximately how much do you weigh?

17 A. One thirty.

18 Q. Hundred thirty pounds?

19 A. Yes.

20 Q. Do you currently work?

21 A. Yes.

22 Q. What kind of work do you do?

23 A. I am a salesperson in a cell phone store.

24 Q. How long have you been doing that?

25 A. Two years.

E4SUMCC2

"Biurny Peguero"

1 Q. What type of hours do you work?

2 A. A week, like around 53, 54 hours.

3 Q. I'd like to direct your attention to the night of Saturday,  
4 September 17, 2005 through the early morning hours of September  
5 18, 2005. OK?

6 Do you remember that night?

7 A. Yes.

8 Q. Who were you with that night earlier in the night?

9 A. Early in the night, my friend Aurora, Maria and Heliana.

10 Q. What were you guys doing that night?

11 A. We were going to a club.

12 Q. What was the name of the club, do you remember?

13 A. Umbrella.

14 Q. Umbrella?

15 A. Mm hmm.

16 Q. Do you know where that's located?

17 A. In New York in 202, I don't -- I don't know the exact  
18 address.

19 Q. OK.

20 Is it here in the county of New York?

21 A. Yes.

22 Q. And how did you get there?

23 A. By car.

24 Q. Do you know who drove?

25 A. Aurora.

E4SUMCC2

"Biurny Peguero"

1 Q. Whose car was it?

2 A. Her car.

3 Q. Do you know what kind of car it is that you drove in?

4 A. A Honda.

5 Q. A Honda?

6 Do you know what color it was?

7 A. It was like gold.

8 Q. Do you remember what you were wearing that night?

9 A. Yes.

10 Q. Can you tell us what you were wearing?

11 A. Jeans and a tube top, black.

12 Q. Did you have any accessories?

13 A. Yeah, my belt.

14 Q. What kind of belt was it?

15 A. It was a silver belt. It was like metal.

16 Q. I'm going to show you what's already been admitted into  
17 evidence as People's 1.

18 Do you recognize People's 1?

19 A. Excuse me?

20 Q. Do you recognize that?

21 A. Yes.

22 Q. What do you recognize that to be?

23 A. That was in the club.

24 Q. OK.

25 Who is in that photograph?

E4SUMCC2

"Biurny Peguero"

1 A. Heliana, Aurora, Maria and me.

2 Q. Does that photograph fairly depict the way that you looked  
3 that night while you were in the club?

4 A. Yes.

5 Q. And is that taken that night, September 18, 2005?

6 A. Yes.

7 Q. Who was taking care of your son that night?

8 A. His father.

9 Q. Approximately what time did you arrive at Umbrella Lounge?

10 A. At around 12:45, 1.

11 Q. In the morning?

12 A. Yeah.

13 Q. Did you have anything to drink that night?

14 A. Yes.

15 Q. What were you drinking?

16 A. Blue Hawaiians.

17 Q. Do you know what's in that?

18 A. Vodka.

19 Q. And approximately, if you can recall, how many drinks did  
20 you have?

21 A. Four or five.

22 Q. And where did you have those drinks at?

23 A. Umbrella Lounge.

24 Q. Did you have anything to drink before you went to the  
25 lounge?

E4SUMCC2

"Biurny Peguero"

1 A. No.

2 Q. What about after you left?

3 A. No.

4 Q. Approximately what time did you leave the club that night?

5 A. 4, 4:15.

6 Q. Where did you go when you left the club?

7 A. Went to the car.

8 Q. Who was driving at that point?

9 A. Maria.

10 Q. Who else was with you when you left the club?

11 A. Orlando.

12 Q. Was it just you, Maria and Orlando?

13 A. No, me, Orlando, Heliana Maria and Aurora.

14 Q. How long have you known Aurora, approximately?

15 A. Like around seven years, six years.

16 Q. What about Maria?

17 A. Like around three years, four.

18 Q. And Heliana?

19 A. Five, six years.

20 Q. And Orlando?

21 A. At this point?

22 Two years.

23 Q. Do you know where Orlando is today?

24 A. No.

25 Q. When was the last time you heard from him?

E4SUMCC2

"Biurny Peguero"

1 A. Like a month and a half ago.

2 Q. Has anyone told you where he might be?

3 A. His brother told me. He's in the Dominican Republic.

4 Q. What about Heliana, when was the last time that you spoke  
5 to her?

6 A. Like around six months ago.

7 Q. Do you know where she is?

8 A. She moved to New Hampshire.

9 I never -- I used to talk to her before. Now I don't  
10 talk to her anymore.

11 Q. OK.

12 Once you got back to the car after leaving the club,  
13 where did you guys go next?

14 A. To -- to this restaurant, International Restaurant.

15 Q. Do you know where that's located?

16 A. In Dyckman.

17 Q. Is that still in the County of New York?

18 A. Yes.

19 Q. OK.

20 And what happened when you arrived at the restaurant?

21 A. We wanted to stop because I wanted to use the restroom, so  
22 Heliana, Maria, Orlando and me, we went to inside of the  
23 restaurant. We used the bathroom. Then on the way back, they  
24 wanted to eat because it was a restaurant, they were hungry. I  
25 wasn't hungry, so Aurora and I went to the car. I was in the

E4SUMCC2

"Biurny Peguero"

1 car in the backseat.

2 Q. Where was Aurora seated in the car at that time?

3 A. She was in the backseat.

4 Q. Which side was she on? Was she behind the driver or the  
5 passenger?

6 A. The passenger.

7 Q. OK.

8 And where did you go when you went out to the car?

9 A. To the driver's seat.

10 Q. The front or the back?

11 A. The back.

12 Q. And did you get into the car?

13 A. Huh?

14 Q. Did you get into the car?

15 A. Yeah.

16 Q. When you went to the bathroom and went back out to the car,  
17 did you still have all of your clothes with you?

18 A. Yes.

19 Q. Was anything wrong with any of your clothes?

20 A. No.

21 Q. Was your belt still attached?

22 A. Yes.

23 Q. Was it broken at all?

24 A. No.

25 Q. Do you know if Aurora was drinking that night?

E4SUMCC2

"Biurny Peguero"

1 A. Yes.

2 Q. How would you describe how she was at that point?

3 A. She was drunk.

4 Q. What about Heliana?

5 A. She was drunk too.

6 Q. What about Maria?

7 A. She wasn't drunk.

8 Q. And Orlando?

9 A. He drank too. I don't know.

10 Q. Do you recall where the car was parked at that time?

11 A. Yeah, it was in the bus stop right in front of the  
12 restaurant.

13 Q. Where were the keys to the car, if you remember?

14 A. Attached to the car.

15 Q. What do you mean attached?

16 A. The car was on.

17 Q. Was the car parked willingly?

18 A. No, it was in the bus stop.

19 Q. I'm showing you what's previously been entered into  
20 evidence as People's 3.

21 Using People's 3, can you just show for us on People's  
22 3 where the car was parked?

23 You can turn the picture so we can see it and you can  
24 tell us.

25 A. Over here.

E4SUMCC2

"Biurny Peguero"

1 Q. You are pointing to in front of the bus stop?

2 A. Yes.

3 Q. OK.

4 About the middle of the page -- of the photograph?

5 A. Yes.

6 Q. I can take the photograph, thank you.

7 Do you recall if the doors to the car while you were  
8 seated in the car were locked or unlocked?

9 A. They were unlocked.

10 Q. Do you recall if the windows were up or down?

11 A. Up.

12 Q. Can you describe for us what happened as you and Aurora  
13 were seated in the car?

14 A. We were in the car, then a guy came into the car from the  
15 passenger's seat.

16 Q. What side of the car did he get into?

17 A. The passenger seat.

18 Q. Was it the front or the back?

19 A. The front.

20 Q. Had you ever seen this guy before?

21 A. No.

22 Q. What did he look like?

23 A. Light skin.

24 Q. Light skin.

25 And you did notice anything else about him?

E4SUMCC2

"Biurny Peguero"

1 A. He was, like, a little bit chubby.

2 Q. I want you to take a look around the courtroom. Can you  
3 just take a look around the courtroom and tell me if you  
4 recognize anyone? You can take your time?

5 A. Yes.

6 Q. Who do you recognize?

7 A. Him.

8 Q. Can you describe an article of clothing that he is wearing  
9 today?

10 A. A shirt and a tie.

11 Q. For the record, indicating the defendant.

12 Who do you recognize him to be?

13 A. The guy that got into the car.

14 Q. Did anyone ask him to get into the car?

15 A. No.

16 Q. Had you ever seen this man before?

17 A. No.

18 Q. Was he --

19 Before that night, had you ever seen him before?

20 A. No.

21 Q. Did you know, if you know, did Aurora know him?

22 A. No.

23 Q. What happened once he got into the car?

24 A. He was talking to us.

25 Q. What was he saying, if you can remember?

E4SUMCC2

"Biurny Peguero"

1 A. I don't remember exactly what he was saying. I remember  
2 that he was calling me ma.

3 Q. Ma.

4 What does that mean to you?

5 A. It's like a ghetto way to talk to -- to a lady, to a woman.

6 Q. And what was happening while he was in the car with you and  
7 Aurora?

8 A. She was telling him to get out of the car.

9 Q. And did he get out of the car?

10 A. No.

11 Q. What happened next?

12 A. Then I told Aurora that I was going to park the car, and  
13 she told me that, that I was crazy because I don't -- I don't  
14 know how to drive.

15 Q. And were you also drunk?

16 A. Yeah.

17 Q. Why were you going to park the car?

18 A. I know that if I -- if I were to be sober, I would just get  
19 out of the car, but I didn't. I just -- I didn't thought  
20 something was going to happen to me.

21 Q. What happened after you told Aurora that you were going to  
22 park the car?

23 A. She got mad. And I jumped into the front seat, the  
24 driver's seat, and she got out of the car.

25 Q. How did you get out from the backseat to the front seat?

E4SUMCC2

"Biurny Peguero"

1 A. I just jumped into it, from the space between the passenger  
2 and the driver's seat.

3 Q. Did you agree to go anywhere at that point with the  
4 defendant?

5 A. No.

6 Q. Did Aurora agree to go anywhere with him?

7 A. No.

8 Q. Did you notice anything that he was wearing at that time?

9 A. A hat.

10 Q. What kind of hat?

11 A. Like a baseball hat.

12 Q. What happened after Aurora got out of the car?

13 A. I drove, I turned, make a right and he knew that I didn't  
14 know how to drive so he stopped the car.

15 Q. How is it apparent that he knew you didn't know how to  
16 drive the car?

17 A. Because I wasn't driving right.

18 Q. Approximately how far did you drive before the car was  
19 stopped?

20 A. Like a block.

21 Q. OK.

22 And how did the car come to a stop?

23 A. The brake thing.

24 Q. And who pulled the emergency brake?

25 A. He did.

E4SUMCC2

"Biurny Peguero"

1 Q. When you say 'he,' you mean the defendant?

2 A. Yes.

3 Q. I am showing you what's already in evidence as People's 31.

4 Using People's 31, can you see where you drove to,  
5 what corner you went down?

6 A. Yeah. Like around the Fine Fair Supermarket.

7 Q. OK.

8 So at the edge of that photo, the far left edge of the  
9 photograph is where you turned?

10 A. Yeah.

11 Q. OK.

12 When you first drove away, were you able to get the  
13 car -- did the car go around -- actually go around the corner?

14 A. Yes.

15 Q. When the defendant first got into the car with you, who was  
16 he facing? How was his body positioned in the car?

17 A. He turned around, he was facing me.

18 Q. What happened when the defendant pulled the emergency  
19 brake.

20 A. His friend came into the car.

21 Q. Can you describe for us what happened once the car was  
22 stopped? Where did this friend come from?

23 A. He came from a white car and he told me that he was -- he  
24 was talking to me in Spanish. So he told me that -- that he  
25 was going to park my car and that he was going to take me back

E4SUMCC2

"Biurny Peguero"

1 to the restaurant.

2 Q. And where was --

3 So the second guy, what language was he speaking to  
4 you in?

5 A. Spanish.

6 Q. And where were you when he was speaking to you?

7 A. In the driver's seat.

8 Q. And where was the defendant?

9 A. In the passenger's seat?

10 Q. And where was the friend?

11 A. Right next to me.

12 Q. Was he in or outside of the car?

13 A. Out.

14 Q. What happened after he said that he would drive you back to  
15 your friends?

16 A. Nothing. He was acting very nice with me. So I just went  
17 into the backseat. He drove my car to -- Aurora's car, to the  
18 parking lot."

19  
20 (Continued on next page)

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"Biurny Peguero"

1 "Q. Approximately how far away was the parking lot?

2 A. It was like around six, seven blocks, I think.

3 Q. Okay. Where was the defendant when you drove to the  
4 parking lot, the original guy?

5 A. The original guy, he was in the front seat.

6 Q. Okay. And where were you?

7 A. In the back seat.

8 Q. And where was the Spanish-speaking guy?

9 A. Driving.

10 Q. Did you see what happened to the white car?

11 A. He was following us.

12 Q. What happened when you arrived at the parking garage?

13 A. He parked the car there, and then went to the white car.

14 Then he was -- I mean I was under the impression that he  
15 wasn't -- I was under the impression that he was going to take  
16 me back to the restaurant.

17 Q. Who walked back to the white car with you?

18 A. The driver. He did.

19 Q. And when you say he, do you mean the original guy?

20 A. Yeah.

21 Q. The defendant?

22 A. Uh-huh.

23 Q. Was anyone else there at the time?

24 A. The other friend.

25 Q. And did you see where this friend came from?

E4s0mcc3

"Biurny Peguero"

1 A. From the white car.

2 Q. And where was the white car parked when you walked up to  
3 it?

4 A. Right in front of the parking lot.

5 Q. Where did everyone go. Once you arrived at the white car,  
6 where was everyone seated.

7 A. The one that was driving -- the one that was driver  
8 Aurora's car was driving. The third guy was in the passenger's  
9 seat. I was in the back with this guy.

10 Q. With the original guy?

11 A. Uh-huh.

12 Q. What did the other two guys look like.

13 A. The driver looks, he looks Spanish to me. He looks  
14 Dominican. The other guy, he looks Spanish. I don't really  
15 know, I don't really remember him.

16 Q. And what ethnicity are you?

17 A. Excuse me?

18 Q. What ethnicity are you, are you Dominican?

19 A. Yes, I am.

20 Q. Was the original guy lighter or darker than you?

21 A. Lighter.

22 Q. What about the second guy, the Spanish-speaking guy?

23 A. Darker.

24 Q. Than you?

25 A. Uh-huh.

E4s0mcc3

"Biurny Peguero"

1 Q. And what about the third guy.

2 A. Darker.

3 Q. Than you?

4 A. Yes.

5 Q. Where were the two -- excuse me, I'm sorry. Were the two  
6 guys, the driver and the front passenger, the second and third  
7 guy, darker or lighter than the first guy?

8 A. Darker.

9 Q. What happened as you got into the car, where did you go?"

10 THE COURT: Is it a breaking point here?

11 MR. LARKIN: Sure.

12 THE COURT: It's now 5:30, so let's break here, ladies  
13 and gentlemen. We're going to pick up tomorrow at 9:30, so be  
14 here ready to go at 9:30. If you get here early, then you will  
15 get first dibs on coffee and Danish and things like that.  
16 We'll make sure it is here.

17 Bring your notebooks to the jury room, leave them  
18 there, Mr. Deluzio will take them. And let's do everybody's  
19 phone numbers.

20 THE DEPUTY CLERK: I'll print that out.

21 THE COURT: All right. We'll give you a number you  
22 can reach us, if you need to. We'll see you tomorrow.

23 Don't discuss the case, keep an open mind. Don't do  
24 any research, investigations of any kind, nothing, chat rooms.  
25 Just have a good night. Watch TV or listen to the radio or do

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1 whatever it is you normally do. And we'll pick up again  
2 tomorrow. Thanks so much.

3 All rise for the jury.

4 (Jury excused)

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1 (In open court)

2 THE COURT: Okay, have a seat. And you can resume  
3 your place at the table.

4 MS. ZGODNY: Thank you, your Honor.

5 THE COURT: All right. I want to give the jury a  
6 chance to get out of here without us all bumping into them.

7 Also, I should note that we got a letter at 4:22 from  
8 Sarah Hines which some of you may have gotten, as well. I'm  
9 not sure if it was cc'd or not. Doesn't indicate that it was  
10 cc'd, but it's a letter from Ms. Hines, a motion to quash a  
11 letter regarding notes that are the subject of the subpoena.  
12 That's the header, all right.

13 So what I propose is there are four different grounds  
14 on which Ms. Hines is opposing the subpoena for interview  
15 notes. Take a look at those, Mr. Garber and Mr. Cohen. And I  
16 have made arrangements for her to be here tomorrow at 9:00 so,  
17 hopefully, you can read the letter and respond to it tonight.  
18 So that we can use the time before the jury gets here tomorrow  
19 at 9:00 and, hopefully, have resolved the issue quickly, okay.

20 MR. GARBER: You want us to be here at 9:00 also.

21 THE COURT: Yes. You folks should all be here at 9.  
22 9:00. It occurs to me that it could be tricky for Mr.  
23 McCaffrey, since he is in custody. Do you think we have a shot  
24 at getting him here at 9:00, marshals?

25 THE MARSHAL: That shouldn't be a problem, I'll let my

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1 supervisor know, so.

2 THE COURT: Okay, great. Good. Thank you.

3 All right, so anything else we need to discuss today  
4 before I let you go?

5 MR. GARBER: I did speak to Ms. Hines over the lunch  
6 break, and she told me this letter --

7 THE COURT: Is the jury gone?

8 THE DEPUTY CLERK: Filling out the sheet. They have  
9 not left yet.

10 THE COURT: Go ahead.

11 MR. GARBER: I spoke to Ms. Hines. She told me this  
12 letter was coming out, which I didn't see yet. But I also  
13 addressed with her the issue of scheduling for Ms. Strain and,  
14 possible, Mr. Krutoy. And she said that it's a big problem for  
15 Ms. Strain to testify any time before Thursday afternoon. And  
16 I said, well, that could pose a problem for us because of how  
17 things move. So I just, make a theme that will continue. I  
18 think we'll just revisit this tomorrow and see how the schedule  
19 is going, but I'm alerting you to the fact you might have to  
20 make a call to Judge Weibel to carve out some time for her  
21 maybe Wednesday.

22 THE COURT: We'll see what the happens tomorrow.  
23 Anything else, Mr. Larkin?

24 MR. LARKIN: I'm sure there is and I'm forgetting it.  
25 I'll remember it ten minutes after we leave, so if there is,

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1 I'll --

2 THE COURT: Let's talk about just logistics and  
3 timing.

4 So how much more of this trial testimony do we have,  
5 ballpark?

6 MR. LARKIN: Up to you guys. What we planned to read  
7 was the rest of direct, and for Farooqui's direct examination.  
8 And then whatever else the -- I guess whatever else we --

9 MR. GARBER: We previously provided it. But I think  
10 what it's going to be is I would say another -- Peguero is one  
11 of the longest witnesses. I would say maybe two hours.

12 THE COURT: Okay. And then after that?

13 MR. GARBER: Mr. McCaffrey. And then Ms. Pujols. And  
14 the likelihood is that is probably tomorrow. But if we get --

15 THE COURT: Ms. Pujols is coming at 2:00.

16 MR. GARBER: Yeah.

17 THE COURT: I mean do you think we're going to finish  
18 two hours worth of this readback and then Mr. McCaffrey, direct  
19 and cross?

20 MR. GARBER: I don't know. I think my direct of him  
21 is about an hour. I don't know how long the cross will be.

22 MR. LARKIN: A lot depends on if whether doors are  
23 opened, and what areas we can get into on cross. I just, it's  
24 hard for me to know in advance. I wouldn't be surprised if  
25 it's about an hour. So, at least, so --

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1 THE COURT: All right. But then that sounds like we  
2 would at least start Ms. Sosa tomorrow.

3 MR. GARBER: Pujols, or Sosa.

4 THE COURT: I'm sorry, Ms. Pujols.

5 MR. GARBER: Yes.

6 MR. LARKIN: Sure.

7 THE COURT: If she's coming at 2:00, we'll start her.  
8 I don't know if it is worth letting her know it could go into  
9 Wednesday. She probably won't like that, but it's --

10 All right.

11 MR. GARBER: Okay.

12 THE COURT: Anything else for today? All right, so  
13 marshals are going go through this way, great. So that  
14 shouldn't be a problem. Good.

15 All right, let me thank the court reporters. I'll see  
16 you all tomorrow at 9:00.

17 If the defendants wish to respond to Ms. Hines'  
18 letter, you can do that, too.

19 MR. LARKIN: Okay.

20 THE COURT: I guess by tonight.

21 MR. LARKIN: If we are going to just join, we'll  
22 orally say we join. And if we have anything independent to  
23 say, we'll --

24 THE COURT: Right. Really, you're not really a party  
25 to this thing.

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1 MR. LARKIN: Okay.

2 THE COURT: Mr. Garber is obviously going to be  
3 opposing the motion.

4 MR. GARBER: On the potential door opening, okay, I  
5 just wanted to revisit that previously, because I have an  
6 understanding of what the Court's ruling is. If he says that  
7 he is still currently grappling, okay, with the psychological  
8 trauma from this wrongful conviction, that would then open the  
9 door to the fact that he is currently incarcerated. And if he  
10 says something along the lines of he got rearrested because of  
11 the psychological harm he has suffered from his wrongful  
12 conviction, then that would open the door to his prior criminal  
13 record.

14 That's my understanding of the Court's ruling. I just  
15 want to make sure that we're still on the same page with that.  
16 Because, you know, obviously, we want -- I want him to be able  
17 to be comfortable thinking about his direct tonight, and I  
18 certainly don't want to bring out questions that are going  
19 to open the door.

20 THE COURT: Yeah, I think that -- that pretty fairly  
21 states it.

22 MR. GARBER: Okay, okay.

23 THE COURT: Mr. Larkin, do you want to add anything?

24 MR. LARKIN: I -- no, I -- after -- I have to hear  
25 what he says, before we can make a decision.

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1 THE COURT: To the extent he wants to avoid opening  
2 doors, then, I think I need give him as much guidance as I can.  
3 And I think if the argument is going be that the wrongful  
4 conviction I what spawns the criminal conduct that has now led  
5 him back into jail, I think that does open the door to other --

6 MR. LARKIN: I think that opens door to prior arrests  
7 and underlying conduct with regards the prior arrests, as well.

8 THE COURT: Everybody can sit. I guess sounds like  
9 we're not done.

10 MR. GARBER: Underlying conduct. If he is still  
11 grappling with conduct, then it seems to me that brings into  
12 question, calls into question what other causes there might be  
13 for current trauma. I mean current emotional trauma, I -- it's  
14 hard for me to know exactly how it's gonna come out on the  
15 direct. But if that's --

16 THE COURT: The point was he -- at least I took the  
17 point to be if the argument, if the assertion on direct is  
18 going to be that this recent conviction, and the conduct  
19 underlying it are a result of the trauma that flowed from the  
20 wrongful conviction in this rape case, I think I that would  
21 open the door. If he is saying and I still am dealing with the  
22 trauma of, you know, the wrongful incarceration, you know, that  
23 that might -- that, alone, I think might only open the door a  
24 crack. I mean it depends on what the trauma is, so what --  
25 what he is dealing with. So I'm not sure if you intend to be

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1 more specific than what you just said, Mr. Garber, but I think  
2 I need to know that to give you guidance.

3 MR. GARBER: Okay, I mean we're not trying to open any  
4 doors, we are not going to be addressing that argument that I  
5 said that the weapons charge and assault charge you know  
6 were -- you know, the result of the wrongful conviction. We're  
7 not going there. I addressed that just to sort of vet it.

8 So we're not opening that door. But as far as like,  
9 you know, the suffering he is going through, I think we're  
10 going to be addressing it in the past tense. And if we're  
11 addressing it as he is currently suffering, I think I have to  
12 be very specific about what that is in an effort to not relate  
13 it to his prior conduct.

14 THE COURT: What is the current suffering that you  
15 intend to elicit? Flashbacks of some kind?

16 MR. GARBER: The reality is, is that he was diagnosed  
17 with post traumatic stress disorder. We have been precluded  
18 from putting on Dr. Pearson, so we're never going to go there.  
19 His life is never going to be the same. He is struggling with  
20 it. And, you know, going to jail as a rapist in a maximum  
21 security prison is a traumatic event that he grapples with.  
22 He has trouble sleeping. I don't know if I'd call it  
23 flashbacks, necessarily. But maybe he has that. And I don't  
24 want to be prevented from bringing that out. I don't know that  
25 I'm going to guild the lily on it, but I would assume if it's

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1 that specific, it doesn't then open the door to the fact that  
2 he had prior arrests, unless I'm wrong about that.

3 THE COURT: Well, I mean it depends on sort of what  
4 the, I think, what the trauma is now. He has trouble sleeping,  
5 that he has, you know, that he is having flashbacks. I guess  
6 I'm not really sure what --

7 MR. GARBER: What if he says: My life will never be  
8 the same, I'll never forget what I went through, that  
9 experience, okay, has really messed me up, what if he says  
10 that?

11 THE COURT: Really messed me up, I'm not sure what  
12 that means.

13 MR. GARBER: Well, it would be his way of saying it.  
14 I don't have a period of time to put that into context, but  
15 that's Wil McCaffrey saying that this really messed me up.  
16 Those are the words that he uses, or words along those lines  
17 when I'm prepping him, but I don't know, does that open door.

18 THE COURT: Well, I mean let's assume that that is the  
19 testimony, Mr. Larkin, what are you planning to do?

20 MR. LARKIN: Well, it really messed me up. I was  
21 convicted. I went to maximum security prison. I have trouble  
22 sleeping. I mean, I think at a minimum, fairly, he's currently  
23 in a maximum security prison. Perhaps if he has trouble  
24 sleeping, it is because he is in a maximum security prison.  
25 Maybe had nothing to do with the fact that he was once in a

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1 maximum security prison as a rapist. Now he is in a maximum  
2 security prison for other reasons. I mean if all he does is  
3 gets on the stand and says in one sense it messed me up, you  
4 know, there are lots of reasons why things were messed up, so  
5 to speak, with him, prior to this incident. And there is lots  
6 of material on this, your Honor. I mean he has something like  
7 20 adult arrests. He has got multiple assaults. He has  
8 assaults of police officers. He has orders of protection  
9 entered against him in favor of citizens in multiple cases.  
10 One is a 15-year old kid. I mean he has a couple of DWIs,  
11 assaults with a knife. He has the current several convictions.  
12 And, your Honor, if I can also add, I found out there was a  
13 third felony that he was convicted of. I'm not sure it matters  
14 all that much, aggravated unlicensed operation of a motor  
15 vehicle, E felony, third incident, separate incident. I had  
16 planned to cross him on that, unless your Honor tells me not  
17 to. I'm not sure it matters all that much for credibility, but  
18 there is it. So to attribute a general bad emotional state to  
19 this conviction, it seems to me, opens the door to at least  
20 some discussion, some cross-examination of other possible  
21 causes.

22 THE COURT: I mean that sounds right. I mean if  
23 causation is going to be the issue, I do think the fact of  
24 these other arrests and conduct that predates the wrongful  
25 conviction, would be relevant to that, so.

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1 MR. GARBER: If he says that he is messed up.

2 THE COURT: Well --

3 MR. GARBER: What if he doesn't say anything, now does  
4 it open --

5 THE COURT: If he doesn't say anything.

6 MR. GARBER: I don't know what -- what --

7 THE COURT: Look, I think he certainly can describe  
8 what the conditions were in jail while he was wrongly  
9 convicted. And I think a jury should hear that, and should  
10 know that that's what it is like. And they can then assess  
11 damages, if it gets that far.

12 But to the extent that you are suggesting that that  
13 experience is causing current and future conduct, I mean I do  
14 think that opens the door to whether or not there were other  
15 causes for it. And, you know, I think that's what Mr. Larkin  
16 is saying. But it is difficult to know in the abstract. It is  
17 difficult to know what the response is in the abstract.

18 MR. LARKIN: I think in the opening, Mr. Garber's  
19 opening, he described Mr. McCaffrey a proud stoic man. I mean  
20 the fact is --

21 THE COURT: Chris, is that some of our jurors looking  
22 for us? I don't want them waiting for us.

23 Yeah, I think they've filled out there information  
24 forms. And we should have done that earlier.

25 MR. LARKIN: Mr. Garber's opening described his client

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1 as a proud, stoic man, as a quiet man. I suggest your Honor  
2 that the record really is otherwise. I mean he just, at  
3 opening, in and of itself, opens the door to some  
4 cross-examination. I --

5 MR. GARBER: He has trouble expressing himself.

6 MR. LARKIN: Describe him that way, given the history  
7 that is there. And I can go through some of it if the Court  
8 wants to hear it before hand. I mean there are at least three  
9 or four --

10 THE COURT: Let's make sure none of the jurors are out  
11 there. Can we close -- thank you.

12 MR. GARBER: Arrests, or just convictions. I mean the  
13 line has never been drawn.

14 MR. LARKIN: Arrests that I'm aware of, has led to  
15 some disposition, so --

16 THE COURT: Okay, I'm sorry, I just --

17 MR. LARKIN: Every arrest that I'm aware of, all 20 of  
18 them led to some disposition, your Honor. And many of them are  
19 involve serious assaultive behavior. Several, he was charged  
20 on multiple occasions with resisting arrest, with assaulting.

21 THE COURT: But you are looking to rebut, what, the  
22 statement that he is a proud and stoic guy?

23 MR. LARKIN: That he is a stoic, quiet man.

24 THE COURT: I don't think his stoicism, I don't think,  
25 in the opening, alone, with that reference, is enough to open

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1 the door to all of the other prior convictions that were prior  
2 bad conduct. So I think I'll take a look, again, at the  
3 opening, but I don't think -- it didn't seem to me to cross the  
4 line. He acknowledges that he wasn't a choirboy.

5 MR. LARKIN: He said, also, that he had suicidal  
6 thoughts in prison. That statement was made to jury in the  
7 opening.

8 THE COURT: Right.

9 MR. LARKIN: I mean, you know, do suicidal thoughts  
10 arise solely -- if the jury is led to think that the sole basis  
11 for suicidal thoughts were a rape conviction, and certain time  
12 in maximum security prison as a rapist, what if there are  
13 alternate reasons for that sort of mindset.

14 THE COURT: So I mean like what are you referring to?

15 MR. LARKIN: It goes back to the idea, well, does this  
16 conviction -- it has caused him tremendous trauma, he is messed  
17 up. He was -- I can go back to the first arrest he had when he  
18 21, he made a statement to the police that someone came to his  
19 home, knocked on the door and threatened him. He came out of  
20 the house with a knife and ended up stabbing the guy. And he  
21 pled to an assault. He made a statement to police that the  
22 person who he stabbed had stolen, previously stolen property  
23 from his house. That person, as far as I know, was not  
24 prosecuted. Mr. McCaffrey was. And that was the start of, you  
25 know --

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1 THE COURT: Right. Look, I don't think we have opened  
2 the door to all of this. So I think to the extent that you are  
3 asserting that various ongoing and future harm is caused by the  
4 rape conviction, I think that does open up the door to other  
5 possible causes, because causation is gonna matter. So, like I  
6 said, I would just say be mindful of that. I don't know what  
7 else to say.

8 MR. GARBER: Okay. So if I limit it to the thinking  
9 he has when he is in jail, serving the time for the rape --

10 THE COURT: I think the conditions of jail, when he is  
11 incarcerated, is certainly --

12 MR. GARBER: And the suffering he went through during  
13 that time period. If it is specific to that time period. Not  
14 currently, but while he is in jail, okay. The suffering that  
15 he went through. You know, I assume that that is okay.

16 THE COURT: Well, again, it depends on what the  
17 suffering is, right, I mean so --

18 MR. GARBER: Suicidal thoughts while he is sitting  
19 there. You know, time. I'm doing 20 years for a rape I didn't  
20 commit, and I contemplated suicide. Does that open the door  
21 to?

22 THE COURT: It opens the door to did you ever think  
23 about suicide before. Did you ever think about suicide on  
24 other occasions, including when you have been in jail before.  
25 I do think that kind of does open it.

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1 MR. GARBER: He is admitting he was in jail for four  
2 and a half months on Rikers Island. We have already vetted  
3 that.

4 THE COURT: My point is if suicidal thoughts are going  
5 to be attributed only to the wrongful conviction, I think there  
6 is certain leeway the defense gets to explore whether or not  
7 suicidal thoughts are independent of that, or they have some  
8 other source. I don't know the answers to any of these  
9 questions. I think a certain amount of cross is permissible on  
10 that.

11 MR. GARBER: So you said that you had suicidal  
12 thoughts, while you were incarcerated for this rape, well, did  
13 you have suicidal thoughts when you assaulted somebody with a  
14 knife when they came to your house.

15 THE COURT: Did you have suicidal thoughts prior to  
16 this; suicidal thoughts, previously, when you were  
17 incarcerated.

18 MR. LARKIN: I was going to ask questions --

19 MR. GARBER: He says no.

20 MR. LARKIN: With regards to -- he can answer how he  
21 wants to answer. That's not the issue. The issue is what  
22 avenues do we have to explore. I mean in a most generic sense,  
23 the Court said the prior periods of incarceration would be  
24 relevant, okay. And there are at least 13 arrests prior to  
25 this one in which he was taken into custody and detained for

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1 some period of time. And deprived of liberty. So at a  
2 minimum, it seems to me the Court's ruling would permit some  
3 exploration of whether he was taken into custody on a certain  
4 date and for approximately how long. And we have records that  
5 can establish that there was some occasions he was taken into  
6 custody and bound over for a day, brought in front of a judge,  
7 and he pled to something. So the specifics wouldn't come out  
8 in the sort of purest baseline cross we might have, assuming  
9 that no doors are opened. We might be able to ask, I assume,  
10 you were in the custody of law enforcement officials on X date,  
11 you were deprived of liberty for 24 hours. Then, on such a  
12 such a date, you were taken into custody, deprived of liberty  
13 for such and such, you know, for 48 hours. You were required  
14 to appear in Court afterward, perhaps. Leave it at that. On  
15 two occasions, or on three occasions.

16 Then on to the next, you know, 2002, you were in  
17 custody on Rikers Island for 4 months. You were sentenced to  
18 7 months, you served 4 months, correct? Correct. In  
19 November 2003, you were in custody for X amount of, you know --

20 THE COURT: I get it, I get it. The gist, I mean  
21 that's -- I think I ruled on that.

22 MR. GARBER: You ruled against him. The rule was that  
23 we can bring out that -- that it would bring out that he was in  
24 a county jail for a period of time. Not every time that he was  
25 incarcerated for a brief period of time on an arrest, because

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1 that's the same way as him telling the jury you were arrested  
2 on this.

3 THE COURT: We're not going to get into the arrests,  
4 the subject of the arrests. We're going to get into the fact  
5 of detention, all right. And then, again, I'm happy to give a  
6 limiting instruction. I don't want the jury speculating as to  
7 the conduct that got him into custody. But, seems to me, the  
8 fact that he was in custody is relevant to the damages here.  
9 And so take a look at my ruling on this. I think it was pretty  
10 clear.

11 MR. LARKIN: I thought the Court was clear on that.

12 THE COURT: Yeah.

13 MR. GARBER: All right. Well, then, I mean more  
14 prejudicial than probative. I will go back and read it. But  
15 if he acknowledges on his direct that he was in custody, or  
16 acknowledges on cross, for a period of time on Rikers Island,  
17 if they start going through a litany, it is very effective  
18 cross-examination of essentially running around your ruling,  
19 because they are showing you were arrested this time. They may  
20 not say that, but that's the implication of it. And little  
21 stints, you know, 24 hours here, 24 hours there, all it shows  
22 is that he is -- has a tremendous amount of contact with law  
23 enforcement. And what does that serve?

24 THE COURT: Well, it serves to show -- I mean for the  
25 same reason that Judge Swain and other judges in the Eastern

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1 District have recognized that this would be relevant to the  
2 damages of the wrongful conviction. That a person who is a  
3 first-time resident at one of these facilities is gonna have a  
4 different set of experiences than a person who has previously  
5 been there before.

6 Now, I don't think the jury should be able to infer  
7 from that, that no harm, no foul, because even if he didn't  
8 commit the rape, he has committed other crimes. That's not  
9 proper. I'll certainly give a limiting instruction. If  
10 anybody wants to think about what it should look like, send me  
11 a draft. But I do think they are allowed to get into the fact  
12 that this is not somebody who was there for the first time and  
13 that, I think, is relevant to damages, and only damages.

14 MR. GARBER: Okay. The other thing is there  
15 was reading in his trial testimony, or giving Mr. McCaffrey's  
16 criminal trial testimony to the jury, they do cross-examine him  
17 about his prior criminal --

18 THE COURT: I thought there was agreement to keep that  
19 out.

20 MR. LARKIN: We agreed to withdraw those designations,  
21 unless the door gets opened, we'll withdraw them and they will  
22 not be put in binders for the jury.

23 THE COURT: I thought we had figured that out on  
24 Friday. Anything else?

25 MR. LARKIN: Just to be clear, after the direct, if we

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1 need the sidebar, that's okay, we'll just ask for it and we'll  
2 resolve it that way.

3 THE COURT: Yeah, we want to be careful.

4 MR. LARKIN: Thank you.

5 THE COURT: Okay. Take a look at the letter. I  
6 would, again, I don't know if it was sent to you. We can print  
7 you out a copy if it allows you to read it on the subway.

8 MR. LARKIN: E-mailed to the both myself and Garber,  
9 so I'll forward it to you right now.

10 MR. COHEN: I didn't see it.

11 THE COURT: Take a look at that. And let me get your  
12 responses tonight and deal with that in the morning.

13 Thanks very much. Have a good evening

14 I thank the marshals and the court reporters for their  
15 help.

16 MS. ZGODNY: May we leave some of the boxes?

17 THE COURT: Yeah, no one is in here.

18 (Proceedings adjourned until 9 a.m., April 29, 2014)

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